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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 443

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, ET AL., PETITIONERS

vs.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, ET AL., ETC.

No. 444

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, ET AL., PETITIONERS

vs.

D. P. PAUL AND COMPANY, INCORPORATED

No. 445

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS

vs.

W. H. LONG & COMPANY, INCORPORATED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 15, 1929
CERTIORARI GRANTED DECEMBER 2, 1929

(34574)
(34575)
(34576)

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1 In United States District Court

Southern New York

Subpœna.

The President of the United States of America to Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York; James M. Doran, Commissioner of Prohibition of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; and Andrew W. Mellon, Secretary of the Treasury of the United States, greetings:

You are hereby commanded to appear before the judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity, by Lion Laboratories, Inc., Galeno Chemical Co., Inc., Max Daub, Union Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, and to further do and receive what the said court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars ($250).

Witness, the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, on the 20th day of December, in the year
2 one thousand nine hundred and twenty-eight, and of the Independence of the United States the one hundred and fifty-third.

CHARLES DICKERMAN WILLIAMS,
Plaintiff's Solicitor.

ALEX GILCHRIST, Jr., *Clerk.*

The defendants are required to file their answer or other defense in the above cause in the clerk's office on or before the twentieth day after service hereof, excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX GILCHRIST, Jr., *Clerk.*

3 In United States District Court, Southern District of New York

LION LABORATORIES, INC., GALENO CHEMICAL CO., INC., MAX DAUB, Union Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, plaintiffs

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, defendants

Bill of complaint

Plaintiffs complaining of the defendants by Charles Dickerman Williams, their solicitor, respectfully allege to this honorable court as follows, upon information and belief:

First. That the plaintiffs, Lion Laboratories, Inc., Union Course Pharmacy, Inc., Galeno Chemical Co., Inc., and P. T. Chemical Co., Inc., are corporations duly organized and existing under
4 the laws of the State of New York. The plaintiffs Max Daub and Arthur S. Katzenbogen are citizens of the United States and residents of the State of New York.

Second. The defendant, Maurice Campbell, is Federal prohibition administrator for the Southern District of New York; the defendant, James M. Doran, is Commissioner of Prohibition of the United States; the defendant, David H. Blair, is Commissioner of Internal Revenue of the United States, and the defendant, Andrew W. Mellon, is Secretary of the Treasury of the United States. The defendants are sued in their official capacity. The defendants or their predecessors in office, or some of them, have been granted authority by the laws of the United States to administer and enforce the national prohibition act and statutes amendatory thereof and supplemental thereto. The defendants, or their predecessors in office, or some of them, have had full authority to promulgate rules and regulations relating to the granting, terms, conditions, and control provided for by the national prohibition act in statutes amendatory thereof and supplemental thereto.

Third. Heretofore and at various times prior to October 1, 1927, plaintiffs obtained from the defendants, or their predecessors in office or some of them, in accordance with the rules and regulations theretofore prescribed by the Commissioner of Internal Revenue of the United States, with the approval of the Secretary of the Treasury of the United States, permits to use intoxicating liquors, in-
5 cluding whiskey, in the manufacture of certain medicinal preparations listed on applications therefore and submitted

Before issuing said permits defendants, or their predecessors in office or some of them, investigated the formulæ of the medicinal preparations listed on said applications, and in every case defendants, or their predecessors in office, or some of them, approved the inclusion of whiskey in said formulæ.

Fourth. Said permits, except the permit of Max Daub, did not by their terms provide for their expiration at any specific date, but by their terms provided that they were subject to all the provisions of regulation 60 relating to permits and their effect. Regulation 60 provided in section 260 thereof that all permits prefaced by the letter "H" should continue in full force and effect so long as the supporting bond required by regulation 60 remained in full force and effect, or until cancelled, suspended, revoked, or voluntarily surrendered by the permittee. Plaintiffs hold permits prefaced by the letter "H."

Fifth. The plaintiff, Daub, holds a permit prefaced by the letter "H" and containing "December 31, 1924," as the expiration date. Prior to said expiration date defendants, or their predecessors in office, or some of them, issued regulations as previously alleged, providing that such permits should remain in full force and effect so long as the supporting bond required by said regulations remained in full force and effect or until cancelled, suspended, revoked, or voluntarily surrendered by the permittee.

6 Sixth. On the 2nd day of September, 1927, the defendant, James M. Doran, as Acting Commissioner of Prohibition, and the defendant, Andrew W. Mellon, through his assistant, Ogden L. Mills, then Acting Secretary of the Treasury, promulgated regulations 2 of the Bureau of Prohibition. Said regulations 2 became effective on October 1, 1927. Section 218 of said regulations 2 provided that all permits, including "H" permits, issued and in force and in effect on the effective date of regulations 2 should expire on December 31, 1928, unless renewed.

Seventh. On information and belief that on November 30, 1928, the defendant, James M. Doran, promulgated a circular, which was released on December 1, 1928, to all prohibition administrators, stating that all permittees now using whiskey and alcohol for manufacturing purposes and who have applied for the renewal of their permits should be notified immediately that they will be granted a hearing for the purpose of determining the necessity, if any, for the use of whiskey in their products. Said circular also stated that an opportunity should be afforded each permittee before the expiration date of his present permit, to present such evidence as he can to establish that no other spirits will properly serve for extraction and solution of the ingredients contained in his product or products, and for the preservation thereof, and that unless such facts can be clearly demonstrated the permittee's application for a permit to use whiskey for the year 1929 should be disapproved. At various

times between July 1, 1928, and August 31, 1928, plaintiffs, in
7 order to safeguard themselves in the premises, but without intending to waive any of their rights, filed applications with the defendant, Maurice Campbell, for the renewal of their said permits for the year 1929.

Eighth. On various days between December 5, 1928, and December 15, 1928, plaintiffs received from the defendant, Maurice Campbell, letters advising plaintiffs that hearings were scheduled at various times on or before December 22, 1928, for the purpose of determining whether or not whiskey was a necessary ingredient in plaintiffs' special formulæ or whether alcohol or other spirits would properly serve for extraction or solution of the ingredients contained in said products and for the preservation thereof.

Ninth. Plaintiffs have for many years past manufactured, distributed, and sold quantities of pharmaceutical products and have acquired an extensive and valuable good will for such pharmaceutical products manufactured by them. A large number of the pharmaceutical products plaintiffs have manufactured, distributed, and sold and in connection with which they have acquired an extensive and valuable good will, have contained as an essential and necessary ingredient in the formulæ a percentage of whiskey which is necessary for the proper functioning of said formulæ. Neither alcohol nor other spirits can be substituted by plaintiff for the percentage of whiskey used in the said special formulæ in the manufacturing of said pharmaceutical products. The defendants herein in fact approved said special formulæ when plaintiffs applied for their permits, as previously alleged.

8 Tenth. No proceedings have been instituted or are now pending against the plaintiffs for the revocation of their permits prefaced by the letter "H" or any other permits issued to them pursuant to the national prohibition act.

Eleventh. Plaintiffs have not surrendered or cancelled their said permits, prefaced by the letter "H," nor do they intend to do so. Said permits have not been revoked or cancelled by the defendants herein, in violation of the national prohibition act or the rules and regulations promulgated pursuant thereto.

Twelfth. The bonds filed by plaintiffs at the time or prior to the time of the issue of their respective permits have at all times since the issuance of said permits and are at the present time in full force and effect.

Thirteenth. Section 218 of regulations 2 promulgated by the defendant, James M. Doran, and the defendant, Andrew W. Mellon, on September 2, 1927, and effective October 1, 1928, is, and in so far as it purports to cancel, terminate, suspend, or revoke the said permits of the plaintiffs on December 31, 1928, is an illegal and unauthorized attempt by the defendants herein to cancel and revoke a permit without a hearing as required by section 9 of title 2 of the national prohibition act.

Fourteenth. The aforementioned circular letter promulgated by the defendant, James M. Doran, and the aforementioned letters from the defendant, Maurice Campbell, to the plaintiffs are illegal and unauthorized by the national prohibition act and the rules and regulations promulgated thereunder. Said letters are illegal and unauthorized attempts by said defendants to terminate, cancel, and revoke, in whole or in part, plaintiffs' said permits without the hearing provided for by section 9 of title 2 of the national prohibition act.

Fifteenth. Because of the aforementioned acts of said defendant the plaintiffs may suffer great financial loss and irreparable damage since plaintiffs have made many contracts for the future delivery of its pharmaceutical products in accordance with the special formulæ approved by the defendants, which must have as a necessary and essential element a percentage of whiskey. Furthermore, to compel plaintiffs to engage in a hearing to show cause why they should not substitute alcohol for whiskey will put plaintiffs to great and unnecessary anxiety and expense. Plaintiffs will have to engage expert physicians and pharmacists as witnesses, employ legal counsel for a protracted period, suffer great inconvenience and harrassment, and in many other ways be subjected to embarrassment. If the aforesaid acts of the defendant are not enjoined the plaintiff may lose many of its valuable customers and suffer very great damage thereby, for which there is no adequate remedy at law.

Wherefore plaintiffs respectfully pray as follows:

1. That a writ of subpœna issue to the defendants Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, commanding them and each of them to appear and make answer thereto.

2. That the court issue temporary and permanent injunctions restraining the defendants and each of them from enforcing in any way, by hearing, letters or otherwise, sec. 218 of regulations 2 in so far as said regulation purports to terminate on December 31, 1928, permits issued as valid until revoked.

3. That the court enter a final decree or order permanently restraining the defendants and each of them and their assistants, agents, and attorneys from in any manner interfering with the plaintiffs in the use and enjoyment of their permits and the rights granted thereunder.

4. That the court issue a temporary injunction restraining the defendants and each of them and their assistants, agents, and attorneys from in any manner interfering with the use and enjoyment by the plaintiffs of their permits until the final hearing and determination of the issues in this proceeding.

5. That the court enter a final decree or order permanently restraining the defendants and each of them and their assistants,

agents, and attorneys from holding any hearing at any time in the future, requiring the plaintiffs to show cause why they should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants as used by the plaintiffs in the manufacture of their medicinal products.

11 6. That the court issue an injunction restraining the defendants and each of them and their assistants, agents, and attorneys from holding any hearing on December 19, 1928, requiring the plaintiffs to show cause why they should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants as used by the plaintiffs in the manufacture of their medicinal products until the final hearing and determination of the issues in this proceeding.

7. That the court enter a final decree or order permanently restraining the defendants and each of them from in any manner interfering with the plaintiffs, and enjoyment by them of their permits or until such time as their permits may be properly revoked in accordance with the provisions of the national prohibition act.

8. That the defendants be enjoined from refusing to honor withdrawal permits for whiskey, alcohol, and wine submitted by the plaintiffs under the authority of their said permits in conformity with the national prohibition act and the regulations promulgated thereunder.

9. That the plaintiffs have such other and further relief as to this court may seem just and proper in the premises.

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiff.

Office & post office address, 68 William Street, Borough of Manhattan, city of New York.

12–17 [*Duly sworn to by Alfred D'Annunzio et al; jurats omitted in printing.*]

18 In United States District Court

[Title omitted.]

Answer

The defendants, Maurice Campbell as Federal prohibition administrator for the Southern District of New York, James M. Doran as Commissioner of Prohibition of the United States, and Andrew W. Mellon as Secretary of the Treasury of the United States, by their solicitor, Charles H. Tuttle, United States Attorney for the Southern District of New York, answering the bill of complaint herein:

19 I. Admit upon information and belief the allegations contained in the paragraph of the bill of complaint designated "First."

II. Admit the allegations contained in the paragraphs of the bill of complaint designated "Second," "Third," "Fifth," "Sixth," "Tenth," and "Twelfth."

III. Deny upon information and belief each and every allegation contained in the paragraphs of the bill of complaint designated "Thirteenth" and "Fifteenth."

IV. Deny each and every allegation contained in the paragraph of the bill of complaint designated "Fourteenth."

V. Admit the allegations contained in the paragraph of the bill of complaint designated "Fourth," except that the defendants deny upon information and belief that the permits referred to in said paragraph of the bill of complaint do not by their terms provide for their expiration at any specific date and respectfully refer the court to the permits for the exact provisions contained therein, copies of which permits, including the permit of Max Daub, are annexed hereto marked "Exhibits A to F," inclusive.

VI. Deny upon information and belief each and every allegation contained in the paragraph of the bill of complaint designated "Seventh," except that defendants admit that the circular referred to in said paragraph of the bill of complaint was sent by the defendant James M. Doran to all prohibition administrators and that the plaintiffs have filed applications for renewal permits with the defendant Maurice Campbell at the time stated in said paragraph of the bill of complaint.

VII. Admit the allegations contained in the paragraph of the bill of complaint designated "Eighth," except that defendants deny that all of the contents of said letters is stated in said paragraph of the bill of complaint.

VIII. As to each and every allegation contained in the paragraph of the bill of complaint designated "Ninth," defendants deny that they have any knowledge or information thereof sufficient to form a belief, except that defendants admit upon information and belief that plaintiffs have manufactured, distributed, and sold some pharmaceutical products, that some of said products have contained a percentage of whiskey, and that defendants or their predecessors in office have approved special formulæ of products manufactured by plaintiffs under permit in which whiskey is an ingredient, and except that defendants deny upon information and belief that alcohol or other spirits can not be substituted by plaintiffs for the whisky used in the formulæ referred to in said paragraph of the bill of complaint in amounts corresponding to the percentage of alcohol in whiskey.

IX. Deny upon information and belief each and every allegation contained in the paragraph of the bill of complaint designated "Eleventh," except that defendants admit that they have not up to the present time revoked or cancelled plaintiffs' permits.

21 FOR A FIRST SEPARATE AND DISTINCT DEFENSE TO ANY CAUSE OF ACTION ALLEGED IN THE BILL OF COMPLAINT THE SAID DEFENDANTS BY THEIR SAID SOLICITOR ALLEGE UPON INFORMATION AND BELIEF

X. That the plaintiffs above named each hold separate and distinct permits; that no one of the plaintiffs have any interest in the permits held by the other plaintiffs herein; that the permits held by Max Daub and Lion Laboratories, Inc., provide by their own terms that they expire December 31, 1924, and December 31, 1924, respectively, and would have expired except for the provisions of regulations No. 60, and that said permit held by Max Daub does not contain the same provisions with respect to an expiration date as are contained in the permits held by the other plaintiffs; that the plaintiffs do not have any common interest in any cause of action alleged in the bill of complaint as would enable them to properly join as parties plaintiffs in this action; that the plaintiffs are attempting to allege six separate and distinct alleged causes of action as one cause of action; and that the bill of complaint herein should be dismissed for misjoinder of parties plaintiffs, and for being multifarious.

FOR A SECOND SEPARATE AND DISTINCT DEFENSE TO ANY CAUSE OF ACTION ALLEGED IN THE BILL OF COMPLAINT THE SAID DEFENDANTS BY THEIR SAID SOLICITOR ALLEGE UPON INFORMATION AND BELIEF

22 XI. That section 218 of regulations No. 2 of the Bureau of Prohibition of the Treasury Department providing that "H" permits of the kind held by the plaintiffs herein shall expire on December 31, 1928, refers solely to the basic permits and does not refer to the purchase or withdrawal permits; that purchase permits are required under the provisions of section 6 of Title II of the national prohibition act to enable plaintiffs to obtain any liquor for use in the manufacture of the products authorized to be manufactured by the basic "H" permit and said purchase permits expire by their own terms in pursuance to the requirements of said section 6 of Title II of the national prohibition act at the end of periods from the dates of issuance not exceeding 90 days; that any of plaintiffs' purchase permits now outstanding are in full force and effect and defendants have not at this time refused to issue any purchase permits; that as regards these purchase permits, the plaintiff has an adequate remedy at law in a mandamus action to be instituted in the District of Columbia if and when the defendants refuse to issue new purchase permits and also the remedy provided in sections 6 and 5 of Title II of the national prohibition act if and when new purchase permits are refused; that any damage that plaintiffs may suffer as a result of any acts on the part of the defendants alleged in the bill of complaint is remote and speculative; that plaintiffs have not alleged facts in the bill of complaint showing that plaintiffs would be irreparably damaged by any of the acts

of the defendants complained of in the bill of complaint; and that this action is prematurely instituted and that the court does not have jurisdiction to grant any injunction at this time or any relief prayed for in the bill of complaint.

FOR A THIRD SEPARATE AND DISTINCT DEFENSE TO ANY CAUSE OF ACTION ALLEGED IN THE BILL OF COMPLAINT, THE SAID DEFENDANTS BY THEIR SAID SOLICITOR ALLEGE UPON INFORMATION AND BELIEF

XII. That the plaintiffs between July 1, 1928, and August 31, 1928, each filed with the defendant prohibition administrator, Maurice Campbell, an application for a renewal of their permit for the year 1929 in accordance with the provisions of regulations No. 2 of the Bureau of Prohibition of the Treasury Department; that the plaintiffs by their said action in filing said applications acquiesced in the provisions of said regulations No. 2 providing for the termination of their "H" permits on December 31, 1928, and thereby surrendered their "H" permits as of December 31, 1928; and that the plaintiffs have waived by their action in filing said applications any rights they may have had to object to the provisions of said regulations No. 2 providing for the termination of "H" permits on December 31, 1928, unless renewal permits be granted; and that the plaintiffs are estopped from contending that said provisions of regulations No. 2 are invalid.

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE TO ANY CAUSE OF ACTION ALLEGED IN THE BILL OF COMPLAINT, THE SAID DEFENDANTS BY THEIR SAID SOLICITOR UPON INFORMATION AND BELIEF ALLEGE

XIII. That heretofore the plaintiffs applied to the proper officers of the United States for "H" permits authorizing the use of intoxicating liquor in the manufacture of various products and obtained such permits which were issued on the dates stated in said permits, copies of which marked "Exhibits A to F," inclusive, are annexed hereto, and made a part hereof with the same force and effect as though here set forth at length; that said permits, with the exception of the permits issued to the plaintiffs, Max Daub and Lion Laboratories, Inc., did not have therein a stated expiration date at the time of their issuance, but do contain the provision among other provisions that the permits may be amended or modified in the manner and for the causes set forth in regulations 60, or specifically set forth in the permit or agreed to by the plaintiffs or otherwise provided by law and the permits issued to the plaintiffs, Max Daub and Lion Laboratories, Inc., contain the dates December 31, 1924, and December 31, 1926, respectively, as the dates of expiration of the permits; that section 218 of regulations No. 2 of the Bureau of Prohibition of the Treasury Department was duly promulgated and issued subsequent to the dates of issuance of said permits and supersedes any conflicting provisions in regulations No. 60 and provides in sub-

stance that "H" permits among others will expire on December 31, 1928; that said section of regulations No. 2 is a valid, reasonable, regulation and is incorporated by reference as a part of plaintiffs' said permits by reason of the said provisions contained in plaintiffs' said permits; that by reason of section 218 and the other provisions of regulations No. 2 the plaintiffs' permits will expire on December 31, 1928, unless renewed; that in order to furnish the plaintiffs an opportunity to present to the defendant prohibition administrator any facts that plaintiffs may desire to present in support of applications that have been filed by plaintiffs with the defendant prohibition administrator, the administrator by letters, copies of which marked "*Ex*-Exhibits G to L," inclusive, annexed hereto, notified the plaintiffs that they would be given a hearing on their applications at the times set forth in said letters; that in pursuance to the circular issued by the Commissioner of Prohibition referred to in paragraph "Seventh" of the bill of complaint, a copy of which marked "Exhibit M" is annexed hereto, the defendant prohibition administrator requested in said letters, Exhibits G to L, annexed hereto, that the plaintiffs inform the administrator at said hearings why they could not use alcohol in the preparations manufactured by them under their existing permits in the place of whiskey; that alcohol is a better solvent preservative and extracting agency than whiskey and that whiskey is not used in all patented, patent and proprietary medicines and may not be necessary in some or all of the products manufactured by plaintiffs and its use in plaintiff's products may not be authorized by the national prohibition act; that there is more likelihood of whiskey being diverted by permittees to illegal beverage purposes than alcohol, and in order to effectively enforce the national prohibition act, it is necessary to restrict the use of whiskey except by persons who unquestionably have a lawful demand and use for said whiskey; that some of the plaintiffs prior to the dates of the issuance of their existing permits have held "H" permits that by their terms expire annually and have obtained renewals of such permits from time to time; and that it is the purpose of section 218 of regulation No. 2 to place the "H" permits on an annual basis in order to facilitate the enforcement of the national prohibition act by the defendants and to create uniformity in the requirements and provisions of the regulations with respect to the expiration of permits.

FOR A FIFTH SEPARATE AND DISTINCT DEFENSE TO ANY CAUSE OF ACTION ALLEGED IN THE BILL OF COMPLAINT, THE SAID DEFENDANTS BY THEIR SAID SOLICITOR, ALLEGE UPON INFORMATION AND BELIEF

XIV. That there is no allegation in the bill of complaint that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000; that there is no provision in the national pro-

tion act authorizing this suit; and that the court is without jurisdiction to grant the relief prayed for in the bill of complaint.

Wherefore defendants demand judgment dismissing the bill of complaint herein and for costs and disbursements.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitor for all Defendants, except David H. Blair.

U. S. Courts & P. O. Bldg., Borough of Manhattan, city of New York.

Duly sworn to by Maurice Campbell; jurat omitted in printing.

Exhibit A to answer

Treasury Department, United States Internal Revenue. Form 1045. Revised Dec., 1922

Serial No. N. Y.-H.-17762.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

16713-28.

OFFICE OF FEDERAL PROHIBITION COMMISSIONER,
Washington, D. C.

THE CURATONE COMPANY,
Arthur S. Katzenbogen,
204 East 26th St., New York, N. Y.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use intoxicating liquor as herein provided for nonbeverage purposes, to wit:

In the manufacture of the preparations listed on application dated February 25, 1925, and marked approved by this office.

This permit is issued for 50 wine gal' ons of whiskey per quarterly period.

8/1/28 permit is hereby amended to show change of address from 1344 Nostrand Ave., Brooklyn, N. Y., to 204 East 26th St., New York City. Consent of surety filed. AG.

WILLIAM D. MOSS,
Acting Prohibition Administrator.

This permit is given on the condition, and with the understanding, that the business which it authorizes shall, at any time within the usual business hours, be subject to inspection by any internal revenue or prohibition officer as to any requirement of the internal revenue or prohibition laws, and by any State officer for the purposes authorized in section 34 of the national prohibition act,

and any denial of, or interference with, such inspection will be deemed grounds for citation for revocation.

The penal sum of the bond required to support this permit shall be not less than $1,000—12/22/27.

This permit is effective from the date hereof, and will remain in force unless revoked, suspended, or renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law. This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this May 19, 1925.

(Signed) R. A. HAYNES,
Prohibition Commissioner.

30 *Exhibit B to answer*

Treasury Department, United States Internal Revenue. Form 1405.
Revised Dec., 1922

Serial No. N. Y. H.-16859.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

17752-30.

OFFICE OF FEDERAL PROHIBITION COMMISSIONER,
Washington, D. C.

To MAX DAUB,
1690 80th St., Brooklyn, New York.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use whiskey for nonbeverage purposes, to wit:

In the manufacture of the preparations listed on application dated May 6, 1924 and marked approved by this office.

This permit is issued for 100 wine gallons of whiskey per quarterly period.

Permit amended to allow 150 wine gallons of whiskey per quarterly period. (4/28/25.)

"This permit is given upon the condition and with the understanding that where the articles the manufacture of which it authorizes are sold to a jobber or to a wholesaler such jobber or whole

saler must at all times be required by the manufacturer to
31 hold such articles subject to the inspection of any internal revenue or prohibition officer or State officers, as provided in section 34 of the national prohibition act, and such jobbers or wholesalers shall at all times when required submit a report of the quantity of such articles received, the amount on hand, and the manner of disposition, and any failure by such jobber or wholesaler to permit such inspection, or to submit such report, will be deemed ground for citation revocation, and you will therefore, exact these requirements from all persons to whom the articles are sold in the manner indicated."

4/28/25. Amended auth. Wash. letter dated 4/17/25

EF/ee

This permit is given on the condition and with the understanding that the business which it authorizes shall, at any time within the usual business hours, be subject to inspection by any internal revenue or prohibition officer as to any requirement of the internal revenue or prohibition laws, and by any State officer for the purposes authorized in section 34 of the national prohibition act, and any denial of or interference with, such inspection will be deemed grounds for citation for revocation.

PALMER CANFIELD,
Federal Prohibition Director.

The penal sum of the bond required to support this permit shall be not less than $4,000—12-27-23.

This permit is effective from the date hereof, and will remain
32 in force until December 31, 1924, unless revoked, suspended, or renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law. This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this Aug. 26, 1924.

(Signed) R. A. HAYNES,
Prohibition Commissioner.

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H. P. T.

33 *Exhibit C to answer*

Treasury Department, United States Internal Revenue. Form 1405
Revised Dec., 1922

Serial No. N. Y. H.-21894.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

163635-28

OFFICE OF FEDERAL PROHIBITION COMMISSIONER,
Washington, D. C.

TO UNION COURSE PHARMACY, INC.,
436-8 Willoughby Ave., Brooklyn, New York.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use intoxicating liquor as herein provided for nonbeverage purposes, to wit:

In the manufacture of the preparations listed on application dated November 3, 1924, and marked approved by this office.

This permit is issued for 150 proof gallons of whiskey per quarterly period.

5/14/25. Permission is hereby granted to change place of business from cor. 80th St. & Atlantic Ave., Woodhaven, L. I., N. Y., to 436-8 Willoughby Ave., Bklyn., N. Y., per Wash. auth. 5/9/25. Consent of surety filed 4/8/25 A. L.

34 This permit is given on the condition, and with the understanding that the business which it authorizes shall, at any time within the usual business hours, be subject to inspection by any internal revenue or prohibition officer as to any requirement of the internal revenue or prohibition laws and by any State officer for the purposes authorized in section 34 of the national prohibition act, and any denial of, or interference with, such inspection will be deemed grounds for citation for revocation.

PALMER CANFIELD,
Federal Prohibition Director.

The penal sum of the bond required to support this permit shall be not less than $2,000—10/17/24.

This permit is effective from the date hereof, and will remain in force, unless revoked, suspended, or renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60 or specifically set forth herein, or agreed to by the permittee, or

otherwise provided by law. This permit confers only a personal privilege and confers no vested rights and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this Mar. 11, 1925.

(Signed) JAMES E. JONES,
Acting Prohibition Commissioner.

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H. P. S., C. A.
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Exhibit D to answer

Treasury Department, United States Internal Revenue. Form 1405.
Revised Oct., 1925

NEW YORK, N. Y.
Serial No. H-21875. Renewal.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

OFFICE OF PROHIBITION ADMINISTRATOR,
2nd Dist. New York, N. Y. (city and State).

To P. T. CHEMICAL COMPANY, INC.,
1677 Jerome Avenue, New York, N. Y.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use intoxicating liquor as herein provided for nonbeverage purposes, to wit:

In the manufacture of the preparations listed on application dated July 8, 1926, and marked approved by this office for use or sale as indicated thereon.

This permit is issued for 150 wine gallons of whiskey per quarterly period.

This permit supersedes permit N. Y. H-21875, dated January 30, 1925.

This permit is given on condition and with the understanding that the business which it authorizes shall at any time within the usual business hours, be subject to inspection by any internal revenue or prohibition officer as to any requirement of the internal revenue or prohibition laws, and by any State officer for the purposes authorized in section 84 of the national prohibition act, and any denial of, or interference with, inspection will be deemed grounds for citation for revocation.

The penal sum of the bond required to support this permit shall be not less than $2,000—8/22/27.

This permit is effective from the date hereof, and will remain in force until December 31, 192 , unless revoked, suspended, or

renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided
37 by law. This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this twentieth day of November, 1926.

C. P. MILLS,
Prohibition Administrator.

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Exhibit E to answer

Treasury Department, United States Internal Revenue. Form 1405. Revised Oct., 1925

NEW YORK, N. Y.
Serial No. H 20744. Renewal.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

OFFICE OF PROHIBITION ADMINISTRATOR,
2nd Dist. New York, N. Y. (city and State).

To GALENO CHEMICAL COMPANY, INC.,
626 Tenth Avenue, New York, N. Y.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use intoxicating liquor as herein provided for nonbeverage purposes, to wit:

38 In the manufacture of the preparations listed on application dated July 16, 1926, and marked approved by this office for use or sale as indicated thereon.

This permit is issued for 2,400 proof gallons of alcohol, 150 proof gallons of whiskey, and 5,000 gallons of wine per quarterly period.

This permit supersedes permit N. Y. H–20744 dated February 2, 1925.

This permit is given on condition and with the understanding that the business which it authorizes shall at any time within the usual business hours, be subject to inspection by any internal revenue or prohibition officer as to any requirement of the internal revenue or prohibition laws and by any State officer for the purposes au-

thereof in section 84 of the national prohibition act, and any denial of, or interference with, inspection will be deemed grounds for citation for revocation.

The penal sum of the bond required to support this permit shall be not less than $20,000—2/29/28.

This permit is effective from the date hereof, and will remain in force until December 31, 192 , unless revoked, suspended, or renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law.

This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this twentieth day of November, 1926.

C. P. MILLS,
Prohibition Administrator.

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Exhibit F to answer

Treasury Department, United States Internal Revenue.
Form 1405. Revised Dec., 1922

NEW YORK, N. Y.
Ser. No. H-25074.

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

OFFICE OF PROHIBITION ADMINISTRATOR,
2nd Dist., New York, N. Y.

To LION LABORATORIES, INC.,
(*Austin Alexander*) *Vic. Pres., 91 Third Avenue, New York City, N. Y.*

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use ethyl alcohol, whiskey, and sherry wine for other than beverage purposes.

In the manufacture of preparations listed on application dated June 26th, 1925, and marked approved.

This permit is issued for 150 wine gallons of alcohol, 250 wine gallons of whiskey, and 250 gallons of wine per quarterly period.

The penal sum of the bond required to support this permit shall be not less than $5,000—6/3/25.

This permit is effective from the date hereof, and will remain in force until December 31, 1926, unless revoked, suspended, or renewed as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law. This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this 1st day of December, 1925.

(Signature) JOHN C. FOSS,
Federal Prohibition Administrator.

THI.

41 *Exhibit G to answer*

Pro-LA
JEO-JD

DECEMBER 6, 1928.

CURATONE CO.,
204 E. 26th St., New York, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Tuesday, December 18th, 1928, at 9.00 a. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

42 *Exhibit H to answer*

Pro-LA
JEO-JD

DECEMBER 6, 1928.

MAX DAUB,
1690 80th Street, Brooklyn, N. Y.

DEAR SIR: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, your were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Monday, December 17, 1928, at 3.30 p. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

43 *Exhibit I to answer*

Pro-LA
JEO-TB

DECEMBER 6, 1928.

UNION COURSE PHARMACY,
31-01 Jerome Ave., Woodhaven, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Wednesday, December 19, 1928, at 1.30 p. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

44 *Exhibit J to answer*

Pro-LA
JEO:RD

DECEMBER 6, 1928.

P. T. CHEMICAL COMPANY, INC.,
1677 Jerome Avenue, New York, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Friday, December 21, 1928, at 11.00 a. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

45 *Exhibit K to answer*

Pro-LA
JEO-JD

DECEMBER 6, 1928.

GALENO CHEMICAL CO., INC.,
626 10th Avenue, New York, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Tuesday, December 18th, 1928, at 1.30 p. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

46 *Exhibit L to answer*

Pro-LA
JEO-TB

DECEMBER 6, 1928.

LEON LABORATORIES, INC.,
91 Third Ave., New York, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Saturday, December 22nd, 1928, at 10.00 a. m. at # One Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservatoin thereof.

You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

47 *Exhibit M to answer*

LAWRENCE LAW SERVICE,
504 Smith Bldg., Washington, D. C., December 3, 1928.

1928 Bulletin No. 38

USE OF WHISKEY BY PERMITTEES FOR MANUFACTURING PURPOSES

Pro. Circular No. 417, dated November 30 and released December 1, 1928, reads as follows:

To prohibition administrators and others concerned:

Feeling that the use of whiskey by permittees for manufacturing purposes is susceptible of very grave abuse, and bearing in mind that proper supervision of manufacturing operations involving the use of whiskey can not be properly maintained by the inspection force, all permittees now using whiskey for manufacturing purposes and who have applied for the renewal of their permits for 1929 should be notified immediately that they will be granted a hearing by the administrator or a member of his staff designated by him for the purpose of determining the necessity, if any, for whiskey in their products.

Each permittee should be afforded an opportunity before the expiration date of his present permit to present such evidence as he can to establish that no other spirits will properly serve for extraction and solution of the ingredients contained in his product, or

products, and for the preservation thereof. Unless such facts can be clearly demonstrated his application for a permit to use whiskey for the year 1929 should be disapproved.

J. N. DORAN, *Commissioner.*

48 In United States District Court

Order to show cause

[Title omitted.]

December 27, 1928

Upon the affidavit of Charles Dickerman Williams sworn
49 to the 26th day of December, 1928, and annexed hereto, and upon the bill of complaint and answer herein, it is hereby

Ordered that the defendants, except the defendant, David H. Blair, Commissioner of Internal Revenue, show cause at a term of this court for motions to be held in room 235 in the United States Courts and Post Office Building, borough of Manhattan, city of New York, on Friday, the 28th of December, 1928, at 10.30 o'clock in the morning of said day, or as soon thereafter as counsel can be heard, why they, and each of them, and their assistants, agents, and attorneys, and any other person acting or attempting to act by virtue of their authorization and in concert with them, should not be temporarily and permanently enjoined and restrained from in any manner interfering with the plaintiffs in the use and enjoyment of their permits prefaced by the letter "H," and the rights granted thereunder, and from assuming to determine, or determining, whether or not alcohol or other spirits instead of whiskey should be used by plaintiffs in the special formulæ heretofore approved by the defendants and used by the plaintiffs in the manufacture of their products under their permits prefaced by the letter "H" and from in any way enforcing and attempting to enforce section 218 of regulations 2, in so far as it purports to terminate on December 31, 1928, permits, when issued, valid until revoked or voluntarily surrendered.

Service of this order and papers annexed thereto on or before 2 o'clock in the afternoon of Thursday, the 27th day of December, 1928, shall be deemed sufficient service hereof.

JULIAN W. MACK, *U. S. C. J.*

Affidavit of Charles Dickerman Williams read in support of motion

50 In United States District Court

[Title omitted.]

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Charles Dickerman Williams, being duly sworn, deposes and says:

I am the solicitor for the plaintiffs herein.

51 This case is similar to the case of D. P. Paul and Company, Inc., vs. Maurice Campbell and others, E47-229. The pl

are holders of permits prefaced by the letter "H." The defendants have attempted arbitrarily to revoke or terminate their permits as of December 31, 1928. An injunction against this attempted interference with rights granted to the plaintiffs by their basic permits was enjoined by this court in the D. P. Paul case on December 20, 1928.

This court, however, declined to enjoin the holding of certain proceedings to determine whether or not whiskey was a necessary ingredient in plaintiffs formulæ, nor would the court stay such hearings. Upon an appeal from this action by the court, the Honorable Martin T. Manton, senior circuit judge of the Second Circuit, stayed such hearings in an order reading as follows:

* * * pending the determination and hearing of said appeal defendants are stayed and restrained from holding any hearing on December 19, 1928, or at any future time, for the purpose of determining whether whiskey is a necessary ingredient in plaintiff's special formulæ, and in any way enforcing sec. 218 of regulations 2, in so far as said regulation purports to terminate on December 31, 1928, permits otherwise in effect until revoked or voluntariylly surrendered.

CHARLES DICKERMAN WILLIAMS.

52 Sworn to before me this 26th day of December, 1928.
[SEAL.]
JOHN R. HAWTHORNE,
Notary Public, Queens County.

County clerk's No. 3349, Reg. No. 3980; New York Co. clerk's No. 1080, Reg. No. 0-704; commission expires March 30, 1930.

53 In United States District Court

[Title omitted.]

Affidavit of Maurice Campbell read in opposition to motion

STATE OF NEW YORK,
City of New York, County of New York, ss:

Maurice Campbell, being duly sworn, deposes and says:

That he is the prohibition administrator for the second dis-
54 trict, comprising the southern and eastern judicial districts of the State of New York, and has occupied this position since July 1, 1927.

That the records of deponent's office show that the above plaintiffs have held permits of the "H" classification and that pursuant to the regulations of the Treasury Department each and every one of the above plaintiffs did file with deponent applications to renew the said permits for the year 1929, and that all of the said renewal applications were filed by the above plaintiffs without any protest of any kind whatsoever so far as deponent's records show.

That in connection with the applications aforesaid filed for renewal of permits deponent accorded each of the above plaintiffs a hearing in connection with the said renewal applications and for the

purpose of determining the necessity for the use of whiskey by each of the above plaintiffs in certain previously approved formulæ.

That upon the conclusion of said hearings deponent determined therefrom and from the evidence on file in deponent's office that whiskey was not a necessary ingredient in any of the preparations manufactured by any of the above plaintiffs. That your deponent, therefore, and on December 27, 1928, issued permits of the "H" classification authorizing the use of spirits other than whiskey to the Galeno Chemical Co., Inc., Max Daub, Union Course Pharmacy Inc., P. T. Chemical Co., Inc., and the Curatone Company.

That deponent in the case of Lion Laboratories Inc., found and determined from the files of deponent's office and from hear-
55 ings heretofore conducted and investigations heretofore made that the present personnel of the said company was not entitled to the confidence of the prohibition department, and your deponent therefore disapproved the application of the said Lion Laboratories, Inc., for a permit for the year 1929.

MAURICE CAMPBELL.

Subscribed and sworn to before me this 28th day of December, 1928.

[SEAL.] MICHAEL C. KEVENEY,
Notary Public.

Kings County Clerk's No. 511, New York County Clerk's No. 529. Commission expires March .

56 In United States District Court

LION LABORATORIES, INC., GALENO CHEMICAL CO., INC., Max Daub, Union Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, plaintiffs

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the southern judicial district of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, defendants — E. 47/237

Decree (Dec. 28, 1928)

This cause came on to be heard and was argued by counsel on December 28, 1928, and thereupon upon consideration thereof, it is

57 Ordered, adjudged, and decreed that, pending the final determination of this action and until the further order of

this court, the defendants, Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, and their successors, and each of them, and their assistants and agents and any and every person acting or attempting to act by virtue of their authorization, be, and they hereby, are enjoined and restrained from taking any action or refusing to take any action with respect to the permits of plaintiffs Galeno Chemical Co., Inc., Union Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, prefaced by the letter "H," by reason of the provisions of section 218 of regulations No. 2 of the Bureau of Prohibition providing that plaintiffs' permits shall terminate on December 31, 1928, and from in any manner interfering with plaintiff in the use and enjoyment of its said permit and the rights granted thereunder, except only by revocation after hearing and otherwise as provided by law or regulations; and it is further

Ordered, adjudged, and decreed that the motion of the plaintiffs, Lion Laboratories, Inc., and Max Daub, for a temporary injunction enjoining and restraining said defendants from taking any action or for refusing to take any action with respect to their permits prefaced by the letter "H" by reason of the provisions of section
218 of regulations No. 2 of the Bureau of Prohibition provid-
58 ing that their permits shall terminate on December 31, 1928, and from in any manner interfering with them in the use and enjoyment of its said permit, and the rights granted thereunder, be, and the same hereby, is denied, and it is further

Ordered, adjudged, and decreed that inasmuch as plaintiffs, Lion Laboratories, Inc., and Max Daub, have orally given notice of intention to appeal from so much of this order as relates to them, that pending the hearing and determination of said appeal defendants are stayed and restrained from taking any action or refusing to take any action with respect to plaintiffs, Lion Laboratories, Inc., and Max Daub, permits prefaced by the letter "H" by reason of the provisions of section 218 of regulations No. 2 of the Bureau of Prohibition that said permits shall terminate on December 31, 1928, and from in any manner interfering with them in the use and enjoyment of its said permits, and the rights granted thereunder; provided, however, that not more than one-third of the quarterly allowance is to be drawn in any month, but, provided that this stay shall be valid for ten days only, unless prior thereto said appeal has been taken; and it is further provided that if such appeal is not prosecuted with due diligence and expedition the United States attorney may move in the Circuit Court of Appeals at any time to have this stay vacated.

JULIAN W. MACK,
United States Circuit Judge.

59 In United States District Court

[Title omitted.]

Plaintiff-appellants' notice of appeal

SIRS: Please take notice that the plaintiffs, Lion Laboratories, Inc., and Max Daub, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of an order made on the 28th day of December, 1928, and entered in the office of the clerk of this court on the 29th day of December, 1928, as denied plaintiffs' motion for a temporary injunction enjoining and restraining said defendants from taking any action or refusing
60 to take any action with respect to their permits prefaced by letter "H" by reason of the provisions of section 218, of regulations #2 of the Bureau of Prohibition providing that such permits shall terminate on December 31, 1928. and from in any manner interfering with them in the use and enjoyment of their said permits and the rights granted thereunder.

Dated, New York, January 4th, 1929.

Yours, etc.,

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiffs, No. 68 William Street,
Borough of Manhattan, City of New York.

To: CHARLES H. TUTTLE, Esq.,
United States Attorney for the Southern District of New York,
United States Courts and Post Office Building,
Borough of Manhattan, City of New York.

ALEXANDER GILCHRIST, Jr., Esq.,
Clerk of the District Court of the United States,
For the Southern District of New York.

61 In United States District Court

[Title omitted.]

Plaintiff-appellants' petition for appeal and order allowing same

The petitioners, Lion Laboratories, Inc., and Max Daub, feeling aggrieved by the order made herein on the 28th Day of December, 1928, by this court, in so far as said order denied petitioners' motion for a temporary injunction enjoining and restraining said defendants from taking any action or for refusing to take any action with respect to their permits prefaced by the letter "H" by reason of the provisions of section 218, regulations #2, of the Bureau of Prohibition providing that their permits shall terminate on December 31, 1928, and from in any manner interfering with them in the use
62 and enjoyment of their said permits and the rights granted thereunder, do hereby appeal from so much of said order and

decision of this court to the United States Circuit Court of Appeals for the Second Circuit and pray that this appeal may be allowed, and that a transcript of all proceedings, and papers on which the said order and decision is made, duly authenticated, may be sent to the United States Court of Appeals for the Second Circuit.

Dated, New York, January 4th, 1929.

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiff.

Order allowing appeal

Appeal as prayed for is hereby allowed upon filing of a bond as provided by law.

Dated, New York, January 4th, 1929.

FRANK J. COLEMAN,
United States District Judge.

63 In United States District Court

[Title omitted.]

Defendant-appellants' petition for appeal and order allowing same

To the honorable Judges of the United States District Court for the Southern District of New York:

Comes now Maurice Campbell, Federal prohibition adminis-
64 trator, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, by their solicitor, Charles H. Tuttle, United States Attorney for the Southern District of New York, and feeling aggrieved by the order and interlocutory decree made herein on the 28th day of December, 1928, by this court, in so far as said order and decree granted a motion by plaintiffs for a temporary injunction and provides:

"Ordered, adjudged, and decreed that, pending the final determination of this action and until the further order of this court, the defendants, Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, and their successors, and each of them, and their assistants and agents, and any and every person acting or attempting to act by virtue of their authorization, be, and they hereby are, enjoined and restrained from taking any action or refusing to take any action with respect to the permits of plaintiffs, Galeno Chemical Co., Inc., United Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, prefaced by the letter "H," by reason of the provi-

sions of section 218 of regulations No. 2 of the Bureau of Pro-
65 hibition providing that plaintiffs' permits shall terminate on December 31, 1928, and from in any manner interfering with plaintiff in the use and enjoyment of its said permit and the rights granted thereunder, except only by revocation after hearing and otherwise as provided by law or regulations."

and complain that in the record and proceedings had in such cause, manifest error has happened to the great damage of the petitioners as set forth in the assignments of error annexed hereto.

Wherefore the said defendants, Maurice Campbell, Federal prohibition administrator, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, do hereby appeal from said part of said decision, order, and decree of this court to the Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order and decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, and that the same may be corrected.

Dated, New York, N. Y., Jan. 17, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York.

Order allowing appeal

Appeal as prayed for is hereby allowed.

Dated, New York, N. Y., Jan. 17, 1929.

J. W. MACK, *U. S. C. J.*

66 In United States District Court

[Title omitted.]

Plaintiff-appellants' assignment of errors

Now come the plaintiffs, Lion Laboratories, Inc., and Max Daub, appellants herein, and say that there are manifest errors in the record of this cause and assign as errors the following:

1. The court erred in making and entering that part of the order and decree made on December 28, 1928, which reads as follows:

"Ordered, adjudged, and decreed that the motion of the plaintiffs, Lion Laboratories, Inc., and Max Daub, for a temporary in-
junction enjoining and restraining said defendants from
67 taking any action or for refusing to take any action with respect to their permits prefaced by the letter "H" by reason of the provisions of section 218, of regulations #2 of the Bureau of Prohibition, providing that their permits shall terminate on De-

ember 31, 1928, and from in any manner interfering with them in the use and enjoyment of its said permits and the rights granted thereunder, be, and the same hereby is, denied."

2. The court erred in refusing to make an order for a temporary injunction enjoining and restraining defendants from taking any action or refusing to take any action or in any way enforcing section 218, of regulations #2 in so far as said regulations purport to terminate on December 31, 1928, letter "H" permits which are otherwise in effect until revoked or voluntarily surrendered.

3. The court erred in holding that because the permits of the plaintiffs above named originally contained an expiration date the defendants could by regulation, free from the limitations of section 9, Title II, of the national prohibition act, revoke or otherwise terminate their permit as of December 31, 1928.

4. The court erred in not holding that any and every effort to enforce said regulations as aforesaid was utterly illegal and void.

5. The court erred in failing to grant the motion made by the plaintiffs on the order to show cause granted by Judge Mack on December 28, 1928, in its entirety.

68-69 Wherefore said plaintiffs-appellants pray that the order in the District Court of the United States for the Southern District of New York for this cause be modified by including therein a temporary injunction enjoining and restraining the defendants in taking any action or in refusing to take any action with respect to their permits prefaced by the letter "H" by reason of the provisions of section 218, of regulations #2 of the Bureau of Prohibition providing that their permits shall terminate on December 31, 1928, or in any manner or in any way interfering with them in the use and enjoyment of their said permits and the rights granted thereunder.

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiffs-Appellants.

[Citation in usual form showing service on U. S. attorney's office omitted in printing.]

70 In United States District Court

[Title omitted.]

Defendant-appellants' notice of appeal

SIR: Please take notice that the defendants, Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition
71 of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit

from so much of an order and interlocutory decree made herein on the 28th day of December, 1928, and entered in the office of the clerk of this court on the 29th day of December, 1928, as granted plaintiffs' motion for a temporary injunction and provides:

"Ordered, adjudged, and decreed that, pending the final determination of this action and until the further order of this court, the defendants, Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, and their successors, and each of them, and their assistants and agents, and any and every person acting or attempting to act by virtue of their authorization be, and they hereby are, enjoined and restrained from taking any action or refusing to take any action with respect to the permits of plaintiff's, Galeno Chemical Co., Inc., Union Course Pharmacy, Inc., P. T. Chemical Co., Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, prefaced by the letter 'H,' by reason of the provisions of section 218 of regulations No. 2 of the Bureau of Prohibition providing that plaintiffs' permits shall terminate on
72 December 31, 1928, and from in any manner interfering with plaintiff in the use and enjoyment of its said permit, and the rights granted thereunder; except only by revocation after hearing and otherwise as provided by law or regulations."

Dated, New York, N. Y., January 17, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitor for Defendants.

Office & P. O. Address, U. S. Courts and Post Office Bldg., Borough of Manhattan, city of New York.

To CHARLES DICKERMAN WILLIAMS, Esq.,
Solicitor for Plaintiffs,
Office & P. O. Address, 68 William Street,
Borough of Manhattan, city of New York.

ALEXANDER GILCHRIST, Jr., Esq.,
Clerk of the District Court of the United States for the Southern District of New York.

73 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Defendant-appellants' assignment of errors

Come now Maurice Campbell, Federal prohibition administrator for the Southern District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue, and Andrew W. Mellon, Secretary

of the Treasury of the United States, the appellants herein,
74 and file the following assignments of error upon which they will rely upon their appeal from that part of an order and interlocutory decree made herein on December 28, 1928, granting a motion by plaintiffs Galeno Chemical Co., Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, for a temporary injunction:

1. The court erred in making and entering that part of the order and decree made herein on December 28th, 1928, and entered herein on December 29, 1928, which reads as follows:

"Ordered, adjudged, and decreed that, pending the final determination of this action and until the further order of this court, the defendants Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, and their successors, and each of them, and their assistants and agents, and any and every person acting or attempting to act by virtue of their authorization, be, and they hereby are, enjoined and restrained from taking any action or refusing to take any action with respect to the permits of plaintiffs, Galeno Chemical Co., Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of the Curatone Company, prefaced by the letter 'H,' by reason of the
75 provisions of section 218 of regulations No. 2 of the Bureau of Prohibition providing that plaintiffs' permits shall terminate on December 31, 1928, and from in any manner interfering with plaintiff in the use and enjoyment of its said permit and the rights granted thereunder, except only by revocation after hearing and otherwise as provided by law or regulations."

2. The court erred in holding that the court had jurisdiction to entertain plaintiff's motion to grant any of the relief prayed for in the bill of complaint.

3. The court erred in holding that this suit was not prematurely instituted and that plaintiffs' might suffer irreparable damage by any threatened acts of the defendants.

4. The court erred in holding that the plaintiffs did not have an adequate remedy at law.

5. The court erred in holding that the plaintiffs-appellees did not surrender their respective permits as of December 31, 1928, and did not waive any right they may have had to object to and to contest the validity of that part of regulations No. 2 of the Bureau of Prohibition of the Treasury Department of the United States providing that "H" permits shall expire on December 31, 1928.

6. The court erred in holding that a part of regulations No. 2 of the Bureau of Prohibition of the Treasury Department of the United States providing that "H" permits shall expire on December 31,

1928, is an unauthorized, invalid, and illegal regulation and that the plaintiffs-appellees' said permits would continue in full force and effect after December 31, 1928.

76 7. The court erred in holding that the Commissioner of Prohibition, by and with the approval of the Secretary of the Treasury of the United States, has no authority to amend the regulations issued under the provisions of the national prohibition act and the acts amendatory thereof and supplemental thereto, so as to provide that all permits of a certain class or classes issued without a specific expiration date shall terminate at a specific time.

8. The court erred in holding that there was not a misjoinder of parties plaintiffs and that the bill of complaint was not multifarious.

Wherefore appellants pray that the order and decree of the said court may be reversed, and in order that the foregoing assignments of error may be made a part of the record the appellants present the same to the court and pray that such disposition may be made thereof as is in accordance with the laws and statutes of the United States in such matters made and provided.

All of which is hereby submitted.

Dated, New York, N. Y., January , 1929.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Solicitor for Appellants.

Office & P. O. address, U. S. Courts and Post Office Bldg., borough of Manhattan, city of New York.

77–78 [Citation in usual form showing service on C. D. Williams omitted in printing.]

79 In United States District Court

[Title omitted.]

Stipulation as to the record

It is hereby stipulated and agreed that the foregoing is a
80 true transcript of the record of the said District Court in the above-entitled matters as agreed on by the respective parties above named.

Dated, March 4, 1929.

CHARLES H. TUTTLE,
Solicitor for Defendants-Appellees
and Defendants-Appellants.
CHARLES DICKERMAN WILLIAMS,
Solicitor for the Plaintiffs-Appellants
and Plaintiffs-Appellees.

81–82 [Clerk's certificate to foregoing transcript omitted in printing.]

In United States Circuit Court of Appeals for the Second Circuit

LION LABORATORIES, INC., AND MAX DAUB, APPELLANTS

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE Southern Judicial District of New York, et al, appellees

Before MANTON, L. HAND, and CHASE, Circuits Judges

Opinion

Appeal by Lion Laboratories and Max Daub from an interlocutory order of the District Court for the Southern District of New York denying a motion for an injunction pendente lite forbidding the defendants to interfere with certain permits issued to them for the use of whisky in the manufacture of drugs. Appeal by the defendants from that part of the same order which gave such relief to the other plaintiffs.

The plaintiffs, Galeno Chemical Company, Union Course Pharmacy, P. T. Chemical Company, and Arthur S. Katzenbogen, had obtained "permits for the use of whisky in medicinal preparations." These recited that they were to "remain in force unless revoked, suspended, or renewed as provided by law or regulations. All
34 provisions of regulation 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. * * * This permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulation 60, or specifically set forth herein * * * or otherwise provided by law." Daub had a similar permit, but it expired by its own terms on December 31, 1924; that of the Lion Company on December 31, 1926.

On September 2, 1927, the Prohibition Commissioner and Secretary of the Treasury by regulation provided that all permits of the class held by the plaintiffs should end on December 31, 1928. On December 1, 1928, the Prohibition Commissioner addressed a circular to all prohibition administrators directing them not to issue permits for whisky in compounding drugs when alcohol would serve. The defendant, Campbell, so notified the plaintiffs, whereupon they filed a joint bill, each in his own right, and moved for an injunction pendente lite.

The court refused relief to Daub and the Lion Company, but granted it to the other plaintiffs. The defeated parties in each case appealed.

Charles D. Williams for the plaintiffs; U. S. Grant for the defendants.

L. HAND, Circuit Judge: This cause has been presented by both sides as a test of the merits of the bill. We therefore

pass the question whether it was proper to grant an injunction pendente lite at all. If the bill rested upon section nine of Title II, certainly it was not; if it depended upon the general equity powers of the court, we do not decide whether the policy manifested in section nine applies when there has been no hearing before the commissioner and when as here the revocation was by regulation (§ 210, regulations 2, Oct. 1, 1927). With this reservation we pass at once to the merits.

In Higgins v. Foster, 12 Fed. (2) 646, we held that the action of the commissioner was unlawful in revoking without hearing a permit to manufacture denatured alcohol. The permit was to continue until surrendered or cancelled, and the commissioner argued that he had been without power to issue it in that form and that it had expired on December 31st of the succeeding year. His revocation had therefore done nothing more than declare what the law would effect without it. This he urged because the second paragraph of section six provided that permits to manufacture "liquor" must be issued for one year and must expire on the thirty-first day of December. We held that a permit to manufacture denatured alcohol was not a permit to manufacture "liquor," since "liquor" was so defined in section 1 of Title II as to exclude it. Hence we held that such permits need not be measured by months or days, and that the commissioner had originally acted within his powers. On the reargument we adhered to this position and further said obiter that the first two paragraphs of section six referred only to "liquor."

86 The present case is an effort to reargue the point decided in Higgins v. Foster, because the Circuit Court of Appeals for the Seventh Circuit has differed with us as to the interpretation of "liquor." (Chicago Grain Co. v. Mullen, 12 Fed. (2) 362.) The defendants do not, however, press that point again, but rely upon certain language in the second paragraph of section six, not then called to our attention, which reads as follows: "Every permit shall be in writing, dated when issued and signed by the commissioner or his agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed." The argument is that the words "designate and limit * * * the time when * * * such acts shall be performed" necessarily require the commissioner to limit all permits by the calendar and forbid his granting them as here until they are revoked.

The point is not a good one, even though we went too far in saying that no part of the first two paragraphs of section six touched anything but "liquor." The language does not mean that the permit must expire by the calendar, but only that it must "designate and limit" its own duration; its temporal, like its spatial, termination must be stated. This was doubtless in order that there

should be no controversy over the period within which the acts allowed should be lawful. An uncertain event is as effective a limit as a certain. It is apparent that when Congress meant to circumscribe the commissioner's powers by fixing a duration measured by months or days it did so expressly. Thus permits to manufacture, prescribe, sell, or transport liquor were not to last beyond December thirty-first of the succeeding year; a permit to buy it, not more than thirty or ninety days, as the case might be. There were no such periods set for other permits, and there is no reason to suppose that more was intended than that the term of their validity should be declared, however measured. To say that they should last until surrendered or revoked accomplished all that the law demanded. Therefore we adhere to our ruling in Higgins v. Foster that permits to manufacture the substances defined in section four need not expire on a day named.

The defendants argue, however, that the permits at bar were only to last "unless revoked * * * as provided by law or regulations," and that they might "be revoked * * * in the manner and for the causes set forth in regulations 60 * * * or" as "otherwise provided by law." This language did not, however, reserve power to revoke them contrary to section nine or at the pleasure of the commissioner, assuming that that would have been lawful. If that had been intended, more should have been said; the reservation meant only that the permit was subject to termination by existing law and that never took place.

This disposes of all the cases except those of Daub and the Lion Company. As to Daub, his permit was limited to December 31, 1924, and was never renewed. The circular letter of September 1, 1926, which attempted to extend all such permits as those now at bar, did not profess to extend any which had theretofore expired; the language used was "will continue to be in operation until surrendered," or revoked or until the bond fails. This did not revive a permit already expired. However, it did affect to continue those then in existence, and the Lion Company's permit by its terms expired on December 31, 1926. If the extension was valid, it put that permit into the same class as those of the other plaintiffs.

The first proviso of the second paragraph of section six provides "that the commissioner may without formal application or new bond extend any permit granted under this act or laws now in force after August 31st in any year to December 31st of the succeeding year." If this applies to a permit to make the substances defined in section four, the circular letter of September 1, 1926, was valid to extend the Lion Company's permit to December 31, 1927, but no further. Obviously we can not so hold without saying that this part at least of the second paragraph of section six applies to more than "liquor." We think that it does, and that our dictum went too far; the words

"any permit granted under this act or laws now in force" are too specific to be limited by what went immediately before. Hence we hold that the extension effected by the circular letter of September 1, 1926, was limited to December 31, 1927, in all cases where the permit itself was limited by a day certain. This does not affect permits which contained no such limit, for these needed no extension. It follows that the judge was right in holding that the suit as to both Daub and the Lion Company was without equity.

89 The bill is not multifarious. Any parties whose rights are violated by a single act of the defendant as here may in a proper case unite in one bill for their redress. International Organization v. Red Jacket Coal Co., 18 Fed. (2) 839, 846, 847, 848 (C. C. A. 5).) The twenty-sixth equity rule has made the whole question merely one of convenience in the administration of justice. There can surely be no more reasonable instance for allowing several plaintiffs to join than when all are situated as those at bar.

It is a curious argument to say that the bills are premature. The local administrator had already sent out notices that the plaintiffs must file applications for new permits. Certainly that was an unequivocal enough declaration of his purpose, even if section 218 of regulations 2 were not alone enough. The suggestion that the plaintiffs forfeited their rights by preparing against the chance of defeat in their main position we should not have thought it necessary to answer except for Cyman v. Blair, 16 Fed. (2) 279, 281. Just what else the plaintiffs were to do in such a predicament we do not see. If they were wrong in thinking that they needed no permits, the time would have expired to get new ones before they could learn. To say that they agreed to "waive" their rights because they put this anchor to windward seems to us to aggravate their injury.

We agree that the defendant Blair was not a proper party, and the bill as to him will be dismissed; otherwise the decree is affirmed.

90–91 United States Circuit Court of Appeals, Second Circuit

GALENO CHEMICAL COMPANY, INC., ET AL., PLAINTIFFS-APPELLEES

v.

MAURICE CAMPBELL, AS ADMNR., ETC., ET AL., DEFENDANTS-APPELLANTS

Decree

July 15, 1929

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, except as to the defendant Blair, and as to him the bill is dismissed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree. M. T. M. H. B. C.

92 [Clerk's certificate to foregoing transcript omitted in printing.]

93 In United States District Court

For the Southern District of New York

D. P. PAUL AND COMPANY, INC., PLAINTIFF vs. MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Second District, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, defendants	In Equity

Bill of Complaint

Filed Dec. 17, 1928

Plaintiff complaining of the defendants by Charles Dickerman Williams, its solicitor, respectfully alleges to this honorable court as follows:

First. The plaintiff is a corporation duly organized and existing under the laws of the State of New York and brings this action in its own right. Plaintiff is at the present time and at all times hereinafter mentioned was engaged in business at No. 228–230 Greenwich Street, in the borough of Manhattan, city and State of New York, and within this judicial district.

94 Second. Heretofore, on or about January 22, 1925, Roy A. Haynes was the duly appointed, qualified, and acting prohibition administrator of the United States. Said Roy A. Haynes had been given full power in connection with permits issued in this judicial district to grant permits and to revoke permits, said power having been delegated to said Roy A. Haynes by the defendant, David H. Blair, Commissioner of Internal Revenue of the United States, and by the defendant, Andrew W. Mellon, Secretary of the Treasury of the United States.

Third. Heretofore, on or about June 6, 1926, Chester P. Mills was the duly appointed, qualified, and acting Federal prohibition administrator of the Second District, which includes this judicial district. Said Chester P. Mills had been given full power in connection with the issuance of permits in said Second District to grant permits, amend permits, and to revoke permits, such power having been delegated to said Chester P. Mills by the defendant, David H. Blair, Commissioner of Internal Revenue of the United States, and by the defendant, Andrew W. Mellon, Secretary of the Treasury of the United States.

Fourth. David H. Blair, one of the above-named defendants, is the Commissioner of Internal Revenue of the United States, who at all times mentioned herein prior to April 1, 1927, was the duly appointed, qualified, and acting officer of the United States designated by the national prohibition act as the official whose duty it was to enforce said act and all things incidental to and pertaining
95 to said act, and that as such commissioner he had authority to designate the necessary subordinate officers, assistants, or agents for the purpose of aiding and assisting him in enforcing said act. The defendant, David H. Blair, at all times herein mentioned prior to April 1, 1927, had the authority to issue and revoke permits in conformity with the national prohibition act and also had authority to promulgate rules and regulations under the national prohibition act with the approval of the Secretary of the Treasury of the United States.

Fifth. The defendant, Andrew W. Mellon, at all times mentioned herein has been the duly appointed, qualified, and acting Secretary of the Treasury of the United States, who at all times mentioned herein has had full jurisdiction to designate agents to act in his behalf in the enforcement of the national prohibition act and the rules and regulations promulgated thereunder, and to issue permits and to revoke permits that might be granted under and by virtue of the national prohibition act and to approve rules and regulations promulgated by the Commissioner of Internal Revenue, prior to April 1, 1927. Since April 1, 1927, the defendant, Andrew W. Mellon, in addition to the aforesaid jurisdiction under the said national prohibition act, has, by law, been given all the rights, privileges, powers, and duties which theretofore had been conferred by the national prohibition act upon the Commissioner of Internal Revenue, with power to appoint a commissioner of prohibition and to transfer to said commissioner of prohibition all such rights, privileges, powers, and duties under the national prohibition act which
96 theretofore had been conferred by the national prohibition act upon the Commissioner of Internal Revenue.

Sixth. At all times mentioned herein since April 1, 1927, the defendant, James M. Doran, has been the duly appointed, qualified, and acting Acting Commissioner of Prohibition or Commissioner of Prohibition. Said defendant, James M. Doran, had and at the present

time has, authority to designate the necessary subordinate officers, assistants, or agents for the purpose of aiding and assisting him in enforcing the said national prohibition act and all things incidental to or pertaining to said act. The defendant, James M. Doran, has at all times herein since April 1, 1927, had the authority to issue and amend permits and to revoke permits in conformity with the national prohibition act and the rules and regulations promulgated thereunder.

Seventh. The defendant, Maurice Campbell, has at all times hereinafter mentioned since on or about August 30, 1927, been the duly appointed, qualified, and acting Federal prohibition administrator for the Second District. Said defendant, Maurice Campbell is a resident of this judicial district and has been given full power by the defendant, James M. Doran, in connection with the issuance of permits in the Second District to grant and to amend permits and to revoke permits in conformity with the national prohibition act, said power having been delegated to said Maurice Campbell by the defendant, James M. Doran, and the defendant, Andrew W.
97 Mellon, under and by virtue of the national prohibition act and the rules and regulations promulgated thereunder.

Eighth. Heretofore, and on or about the 22nd day of November, 1925, in accordance with the provisions of the act of Congress of October 28, 1919, known as the national prohibition act, the plaintiff obtained from the United States of America, through its duly authorized agent, the then Prohibition Commissioner of the United States, Roy A. Haynes, in accordance with the rules and regulations theretofore prescribed by the Commissioner of Internal Revenue of the United States with the approval of the Secretary of the Treasury of the United States, a permit, designated N. Y. H.-21849, to use intoxicating liquors in the manufacture of certain medicinal preparations listed on the application dated November 14, 1924, and marked approved by said Prohibition Commissioner. Said permit authorized the plaintiff to withdraw 500 wine gallons of alcohol, 200 wine gallons of whiskey, and 100 wine gallons of wine per quarterly period. Said permit was amended on June 30, 1926, by Chester P. Mills, then Federal prohibition administrator for the Second District, to permit an increase in the withdrawal allowance of whiskey to 600 wine gallons per quarterly period. Said permit was further amended on June 18, 1928, by the defendant, Maurice Campbell, Federal prohibition administrator for the Second District, to authorize the plaintiff to include the manufacture of the preparations listed in an application dated May 11, 1928, and marked approved by said defendant, Maurice Campbell. A photostatic copy of said permit N. Y. H.-21849, with the above amend-
98 ments thereon, is annexed hereto and made a part hereof as Exhibit 1.

Ninth. At the time the plaintiff first applied for a permit to use intoxicating liquor in the manufacture of medicinal preparations

plaintiff, on August 20, 1924, filed a bond, as required by the national prohibition act and the regulations promulgated thereunder, satisfactory to the said Roy A. Haynes, then Prohibition Commissioner, in the amount of $25,000, said bond being sufficient to support said permit within the requirements of the rules and regulations promulgated pursuant to the national prohibition act.

Tenth. The aforesaid permit did not by its terms provide for its expiration at any specific date, but by its terms provided that it was subject to all the provisions of regulations 60 relating to permits and their effect. Regulations 60, which was promulgated by Roy A. Haynes, as Federal Prohibition Commissioner, and the defendant, David H. Blair, as Commissioner of Internal Revenue, and approved by the defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, on March 14, 1925, provided in section 260 thereof that while all other basic permits under said regulations 60, if issued prior to August 31 of any year, would expire on December 31 of that year; that all permits prefaced by the letter "H" should continue in full force and effect so long as the supporting bond required by regulations 60 remains in full force and effect or until cancelled, suspended, revoked, or voluntarily surrendered by the permittee.

99 Eleventh. The plaintiff, under the authority and in conformity with said permit N. Y. H.-21849, and in conformity with the national prohibition act and the rules and regulations promulgated thereunder, has, at all times herein mentioned, except during the interval hereinafter indicated in the paragraph of this bill of complaint designated twelfth, withdrawn, on withdrawal permits issued by the then Federal Prohibition Commissioner of the United States, the Commissioner of Internal Revenue of the United States, or the Federal prohibition administrator for the Second District, whiskey, alcohol, and wine. Plaintiff used said whiskey, alcohol, and wine so withdrawn in the manufacture of pharmaceutical products in connection with plaintiff's business at No. 228-230 Greenwich Street, in the borough of Manhattan, city and State of New York, the formulæ for such pharmaceutical products having, as hereinbefore alleged, been approved by the duly appointed, qualified, and acting officers of the United States than in charge of the issuance of permits under the national prohibition act.

Twelfth. Heretofore, on May 21, 1927, the plaintiff received a notice from the Federal prohibition officer of the Second District to show cause why the plaintiff's aforesaid permit N. Y. H.-21849 and its permit to use specifically denatured alcohol, S. D. A. 20158, should not be revoked, twelve charges being alleged in said notice. Thereafter from June 10 to June 20, 1927, hearings were held in the office of the Federal prohibition administrator for the Second District before an agent of said Federal prohibition administrator.

100 On August 30, 1927, the defendant, Maurice Campbell, issued an order sustaining six of the charges alleged in the aforesaid

notice, and said defendant, Maurice Campbell, revoked the said permits of the plaintiff. Plaintiff then appealed to a "board of appeals" at the office of the defendant, Maurice Campbell, and thereafter on November 12, 1927, received a notice from the defendant, Maurice Campbell, that said board had sustained the order revoking the said permits. On November 30, 1927, plaintiff instituted a suit in equity in this court against the defendants herein for the review and the reversal of the order of the defendant, Maurice Campbell, revoking the said permits of the plaintiff. Said case docketed in this court as D. P. Paul & Co., Inc., against Andrew W. Mellon, Secretary of the Treasury, et al., E 43–352, came on to be heard at the December, 1927, term of this court before the Honorable Thomas D. Thacher, United States district judge, and, after argument by counsel and upon consideration thereof, said Honorable Thomas D. Thacher rendered an opinion on January 16, 1928, which is reported in the twenty-fourth volume of the Federal Reporter, Second Series, at page 738. The Honorable Thomas D. Thacher held that the revocation of the plaintiff's permits by the defendant, Maurice Campbell, was not sustained by the evidence and that "the plaintiff has been seriously wronged by the decision of administrative officers which can not be reconciled with the exercise of that fair and impartial hearing and consideration which the law demands in all such [administrative] proceedings." A final decree was entered in said case on January 19, 1927, providing that the defendants
101 in said action, the defendants herein, restore and recognize plaintiff's aforesaid permits with the same force and effect as if the same had not been revoked. Thereafter, in January, 1928, the defendant, Maurice Campbell, restored to plaintiff the said permits. For several months in 1927 and until on or about January 19, 1927, the plaintiff was denied the right to withdraw or use any whiskey, alcohol, or wine under his aforementioned permit N. Y. H.–21849 or to withdraw or use specifically denatured alcohol under the aforesaid permit S. D. A. 20158.

Thirteenth. On the 2nd day of September, 1927, the defendant, James M. Doran, as Acting Commissioner of Prohibition, and the defendant, Andrew W. Mellon, through his assistant, Ogden L. Mills, then Acting Secretary of the Treasury, promulgated regulations 2 of the Bureau of Prohibition, being a revision of regulations 60 hereinbefore mentioned. Said regulations 2 became effective on October 1, 1927. Section 218 of said regulations 2 provided that all permits, including "H" permits, issued and in force and effect on the effective date of said regulations 2 should expire on December 31, 1928, unless renewed. Section 222 of said regulations 2 requires that the renewal of all permits, including "H" permit, shall follow the same procedure as in applications for original permits.

Fourteenth. On or about the 27th day of July, 1928, plaintiff, in order to safeguard itself in the premises but without intending to

waive any of its rights, filed an application with the defendant, Maurice Campbell, for the renewal of its said permit N. Y. H.-21849 for the year 1929.

102 Fifteenth. On information and belief that on November 30, 1928, the defendant, James M. Doran, promulgated a circular which was released on December 1, 1928, to all prohibition administrators, stating that all permittees now using whiskey and alcohol for manufacturing purposes and who have applied for the renewal of their permits should be notified immediately that they will be granted a hearing for the purpose of determining the necessity, if any, for the use of whiskey in their products. Said circular also stated that an opportunity should be afforded each permittee before the expiration date of his present permit to present such evidence as he can to establish that no other spirits will properly serve for extraction and solution of the ingredients contained in his product or products and for the preservation thereof and that unless such facts can be clearly demonstrated the permittee's application for a permit to use whiskey for the year 1929 should be disapproved. A copy of said circular, as published by the Lawrence Law Service, Washington, D. C., is annexed hereto and made a part hereof as Exhibit 2.

Sixteenth. On or about December 8, 1928, the plaintiff received from the defendant, Maurice Campbell, a letter dated December 6, 1928, advising plaintiff that a hearing was scheduled for Wednesday, December 19, 1928, at 9 a. m., at No. 1 Park Avenue, New York City, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in plaintiff's special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the

103 preservation thereof. A copy of this letter is annexed hereto and made a part hereof as Exhibit 3.

Seventeenth. Plaintiff was incorporated in 1922, succeeding to the business partnership of D. P. Paul & Co., which has been located in New York in the business of manufacturing, distributing, and selling pharmaceutical products since 1890. The plaintiff has offices and laboratories in a five-story building at 228–230 Greenwich Street, borough of Manhattan, city of New York, and has a salesroom at 366 Fifth Avenue, borough of Manhattan, city and State of New York. Plaintiff also owns a subsidiary corporation with an office and a factory in Paris, France. Plaintiff employs twenty to fifty employees in New York and, not counting the subsidiary corporation, has invested approximately $100,000 in its business.

Eighteenth. Plaintiff, or its predecessor, has for many years past, and plaintiff since obtaining its permit N. Y. H.-21849, has manufactured, distributed, and sold large quantities of pharmaceutical products and has acquired an extensive and very valuable good will for such pharmaceutical products manufactured by it. A large

part of the pharmaceutical products which plaintiff has manufactured, distributed, and sold, and in connection with which it has acquired an extensive and very valuable good will, have contained as an essential and necessary ingredient in the formulæ a percentage of whiskey which either serves for extraction and solution of the ingredients contained in the product or serves the purpose of preserving the product. Neither alcohol or other spirits can be
104 substituted by plaintiff for the percentage of whiskey used in the said special formulæ in the manufacturing of such pharmaceutical products. On information and belief, the defendants herein, Maurice Campbell and James M. Doran, well know that the whiskey used by plaintiff in the manufacture of its pharmaceutical products is necessary and essential for the special formulæ used by plaintiff, the defendants herein having in fact approved the said special formulæ used by the plaintiff when plaintiff applied for its permit in November, 1924, and when plaintiff subsequently applied for an amendment to its special formulæ on May 11, 1928. On information and belief that the attempt by the defendants herein to require the plaintiff to show cause why the plaintiff should not use alcohol or other spirits instead of whiskey in plaintiff's special formulæ in the manufacture of its pharmaceutical products is aimed to harass and embarrass the plaintiff. Such attempt, if permitted, will result in the loss to plaintiff of its very valuable good will.

Nineteenth. No proceedings have been instituted or are now pending against the plaintiff for the revocation of its permit N. Y. H.-21849 or any other permit issued to the plaintiff pursuant to the national prohibition act, nor has the plaintiff at any time been charged with violating the national prohibition act or the rules and regulations promulgated thereunder, except as hereinbefore referred to in the paragraph of this bill of complaint designated "twelfth."

Twentieth. The plaintiff has not surrendered or can-
105 celled the said permit N. Y. H.-21849, nor does plaintiff intend to do so. The said permit has not been revoked or cancelled by the defendants herein for violation of the provisions of the national prohibition act or the rules and regulations promulgated pursuant thereto.

Twenty-first. The $25,000 bond filed by the plaintiff on August 20th, 1924, and which has at all times mentioned herein been filed with the defendants herein in support of the plaintiff's permit N. Y. H.-21849 has been at all times since the issuance of said permit and is at the present time in full force and effect.

Twenty-second. Section 218 of regulations 2 promulgated by the defendant, James M. Doran, and the defendant, Andrew W. Mellon, on September 2, 1927, and effective October 1, 1928, is, in so far as it purports to cancel, terminate, suspend, or revoke the said permit of the plaintiff, N. Y. H.-21849, on December 31st, 1928, is

an illegal and unauthorized attempt by the defendants herein to cancel and to revoke a permit without a hearing in violation of the national prohibition act and the Constitution of the United States.

Twenty-third. The aforementioned circular letter promulgated by the defendant, James M. Doran, on November 30th, 1928, and the aforementioned letter of December 6th, 1928, from the defendant, Maurice Campbell, to the plaintiff are illegal and unauthorized by the national prohibition act and the rules and regulations promulgated thereunder. Said letter and circular are illegal, and un-
106 authorized attempts by said defendants to terminate, cancel, and revoke in whole or in part plaintiff's said permit N. Y. H.-21849 without the hearing provided for by the national prohibition act and the rules and regulations promulgated pursuant thereto.

Twenty-fourth. The said permit N. Y. H.-21849 as issued to the plaintiff herein is a vested and valuable property right under which the plaintiff has expended considerable money, and the only method available to the defendants to deprive the plaintiff of his said property right in whole or in part is for a violation of the national prohibition act or the rules and regulations promulgated pursuant thereto or by plaintiff's voluntary surrender of said permit N. Y. H.-21849.

Twenty-fifth. Before a permit issued under the national prohibition act can be terminated, cancelled, or revoked, in whole or in part, the commissioner (or his duly authorized agent) must give at least fifteen days' notice by the service of a citation upon the permittee, must specify the charges against the permittee in said citation, and must grant a hearing on said charges against the permittee based on legal and competent evidence.

Twenty-sixth. Section 5 of Title II of the national prohibition act provides that if the commissioner has reason to believe that any article mentioned in section 4 of said Title II, which includes medicinal preparations and proprietary medicines, does not correspond with the descriptions and limitations therein provided the
107 commissioner shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer of said article to show cause why said article should not be dealt with as intoxicating liquor, such notice to be served personally or by mail as the commissioner shall determine.

Twenty-seventh. The medicinal preparations for which the plaintiff's permit NYH-21849 was issued to the plaintiff are medicinal preparations within section 4 of the national prohibition act and the rules and regulations promulgated thereunder, and such medicinal preparations have heretofore been approved by the defendants herein or their predecessors in office, as heretofore alleged. On information and belief said defendants have not caused an analysis

of said medicinal preparations to be made since the time when said preparations were approved on November 22, 1925, by Roy A. Haynes, then Prohibition Commissioner, and on June 18, 1928, by the defendant, Maurice Campbell, and that the defendants have at no time found that said preparations do not correspond with the descriptions and limitations of such preparations as heretofore approved.

Twenty-eighth. The acts on the part of the defendants herein are contrary to the provisions of the national prohibition act and the rules and regulations promulgated pursuant thereto.

Twenty-ninth. The acts on the part of the defendants here-
108 in are contrary to the Constitution of the United States of America in that such acts constitute a taking of property without due process of law.

Thirtieth. The provisions of section 9, Title II, of the national prohibition act and the other sections of the act applicable thereto are mandatory and must be complied with literally by both the defendants and the plaintiff and the permit NYH–21849 of the plaintiff herein can not lawfully be revoked nor can the plaintiff be deproved of his permit NYH–21849, except for a violation of the national prohibition act or the rules and regulations promulgated thereunder. In order that plaintiff's permit be revoked, such violation must be sustained by legal and competent evidence.

Thirty-first. The action of the defendants in promulgating section 218 of regulations 2 and the actions of the defendants pursuant to such regulation in the issuance of the circular of November 30, 1928, and the demand that plaintiff appear at the office of the defendant, Maurice Campbell, on Wednesday, December 19th, 1928, are unjust, contrary to the national prohibition act, contrary to the Constitution of the United States, and in absolute violation of sections 5 and 9 of Title II of the national prohibition act. The plaintiff has not been charged with any violations of the law, and said acts of the defendants have been issued in spite of the fact that the plaintiff has in every respect complied with the national prohibition act and the rules and regulations issued pursuant thereto.

109 Thirty-second. Because of the aforementioned acts of said defendant the plaintiff may suffer great financial loss and irreparable damage, since plaintiff has made many contracts for the future delivery of its pharmaceutical products in accordance with the special formulæ approved by the defendants, which must have as a necessary and essential element a percentage of whiskey. Furthermore, to compel plaintiff to engage in a hearing to show cause why it should not substitute alcohol for whiskey will put plaintiff to great and unnecessary anxiety and expense. Plaintiff will have to engage expert physicians and pharmacists as witnesses, employ legal counsel for a protracted period, suffer great inconvenience and harassment, and in many other ways be subjected to embarrassment. If

the aforesaid acts of the defendant are not enjoined, the plaintiff may lose many of its valuable customers and suffer very great damage thereby, for which there is no adequate remedy at law.

Wherefore plaintiff respectfully prays as follows:

1. That a writ of subpœna issue to the defendants Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States and Andrew W. Mellon, Secretary of the Treasury of the United States, commanding them and each of them to appear and make answer thereto.

110 2. That the court issue temporary and permanent injunctions restraining the defendants and each of them from enforcing in any way, by hearings, letters, or otherwise, sec. 218 of regulations 2 in so far as said regulation purports to terminate on December 31, 1928, permits issued as valid until revoked.

3. That the court enter a final decree or order permanently restraining the defendants and each of them and their assistants, agents, and attorneys from in any manner interfering with the plaintiff in the use and enjoyment of its permit NYH-21849 and the rights granted thereunder.

4. That the court issue a temporary injunction restraining the defendants and each of them and their assistants, agents, and attorneys from in any manner interfering with the use and enjoyment of the plaintiff of its permit NYH-21849 until the final hearing and determination of the issues in this proceeding.

5. That the court enter a final decree or order permanently restraining the defendants and each of them and their assistants, agents, and attorneys from holding any hearing on December 19, 1928, or at any time in the future, requiring the plaintiff to show cause why it should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants as used by the plaintiff in the manufacture of its medicinal products under its permit NYH-21849.

6. That the court issue an injunction restraining the de-
111 fendants and each of them and their assistants, agents, and attorneys from holding any hearing on December 19, 1928, requiring the plaintiff to show cause why it should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants as used by the plaintiff in the manufacture of its medicinal products under its permit NYH-21849 until the final hearing and determination of the issues in this proceeding.

7. That the court enter a final decree or order permanently restraining the defendants and each of them from in any manner interfering with the plaintiff, and enjoyment by it of its permit NYH-21849 or until such time as its permit may be properly revoked in accordance with the provisions of the national prohibition act.

2. That the defendants be enjoined from refusing to honor withdrawal permits for whiskey, alcohol, and wine submitted by the plaintiff under the authority of its said permit NYH-21849 in conformity with the national prohibition act and the regulations promulgated thereunder.

3. That the plaintiff have such other and further relief as to this court may seem just and proper in the premises.

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiff.

Office & post office address, No. 68 William Street, borough of Manhattan, city of New York.

112 *Exhibit 1 to complaint*

Treasury Department, United States Internal Revenue. Form 1405. Revised Oct., 1925

Serial No. N. Y. H-21849.

[Duplicate]

PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER

43163-28

OFFICE OF THE PROHIBITION COMMISSIONER,
Washington, D. C.

To D. P. PAUL & COMPANY, INC.,
228-240 Greenwich Street, New York, New York.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State law, to use intoxicating liquor as herein provided for nonbeverage purposes, to wit:

In the manufacture of the preparations listed on application dated November 14, 1924, and marked approved by this office.

This permit is issued for 500 wine gallons of alcohol, 600 wine gallons of whiskey, and 100 gallons of wine per quarterly period.

This permit supersedes N. Y. H.-21849 issued December 22nd, 1924.

6/30/26—Permit amended to increase withdrawal allowances of whiskey to 600 gallons per quarterly period.

DV/mk

C. P. MILLS,
Federal Prohibition Administrator.

113 This permit is given on condition and with the understanding that the business which it authorizes shall at any time within the usual business hours be subject to inspection by any internal revenue or prohibition officer as to any requirement of the

internal-revenue or prohibition laws and by any State officer for the purposes authorized in section 84 of the national prohibition act, and any denial of, or interference with, inspection will be deemed grounds for citation for revocation.

6/18/28—Permit is hereby amended to include the manufacture of the preparations listed on application dated May 11, 1928, and marked approved by this office.

AG/sp

MAURICE CAMPBELL,
Federal Prohibition Administrator.

The penal sum of the bond required to support this permit shall be not less than $25,000.—8/20/24.

This permit is effective from the date hereof, and will remain in force until ———, unless revoked, suspended, or renewed, as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by
114 the permittee, or otherwise provided by law. This permit confers only a personal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit privileges is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this Jan. 22, 1925.

(Signed) R. A. HAYNES,
Prohibition Commissioner.

hm 20007.

Exhibit 2 to complaint

LAWRENCE LAW SERVICE, 504 SMITH BLDG.,
Washington, D. C., December 3, 1928.

1928 Bulletin No. 38

USE OF WHISKEY BY PERMITTEES FOR MANUFACTURING PURPOSES

Pro. Circular No. 417, dated November 30 and released December 1, 1928, reads as follows:

To prohibition administrators and others concerned:

Feeling that the use of whiskey by permittees for manufacturing purposes is susceptible of very grave abuse, and bearing in mind that proper supervision of manufacturing operations involving
115 the use of whiskey can not be properly maintained by the inspection force, all permittees now using whiskey for manufacturing purposes and who have applied for the renewal of their permits for 1929 should be notified immediately that they will be granted a hearing by the administrator, or a member of his staff

designated by him, for the purpose of determining the necessity, if any, for whiskey in their products.

Each permittee should be afforded an opportunity, before the expiration date of his present permit, to present such evidence as he can to establish that no other spirits will properly serve for extraction and solution of the ingredients contained in his product or products and for the preservation thereof. Unless such facts can be clearly demonstrated his application for a permit to use whiskey for the year 1929 should be disapproved.

J. M. DORAN, *Commissioner.*

[Insert at page 90]

116 *Exhibit 3 to complaint*

TREASURY DEPARTMENT,
U. S. Prohibition Service,
New York, N. Y., December 6, 1928.

Office of prohibition administrator, Southern and Eastern Judicial Districts of New York and State of Connecticut

In reply refer to Pro-La.
JEO-TB.

D. P. PAUL CO., INC.,
228-230 Greenwich St., New York, N. Y.

GENTLEMEN: I have before me for final action your application for a permit of the "H" classification for the year 1929. Under your permit which expires December 31, 1928, you were authorized to manufacture certain special products with the use of whiskey.

You are hereby notified that a hearing is scheduled for Wednesday, December 19th, 1928, at 9.00 a. m. at No. 1 Park Avenue, New York, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in your special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof.

117 You will be accorded an opportunity at this time of presenting any and all evidence you may have bearing upon this question, and upon the merits of your application.

Very truly yours,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

[*Duly sworn to by Andre Basil; jurat omitted in printing.*]

118 Statement as to endorsements on the back of the bill of complaint:

Service admitted for Maurice Campbell on Dec. 13, 1928.

JOHN E. O'NEILL, *Attorney.*

Service admitted:
J. M. DORAN.

119 [Title omitted.]

Order to show cause

December 13, 1928

Upon the bill of complaint of the plaintiff, D. P. Paul and Company, Inc., verified the 13th day of December, 1928, and annexed hereto, and the affidavits of Andre Basil and Charles Dickerman Williams, each sworn herein on the 13th day of December, 1928, and each annexed hereto, it is hereby

120 Ordered, that the defendants, Maurice Campbell, Federal prohibition administrator for the Second District, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, show cause at a term of this court for motions to be held in room 235 of the United States Courts and Post Office Building, borough of Manhattan, city of New York, on Wednesday the 19th day of December, 1928, at 10.30 o'clock in the morning of said day, or as soon thereafter as counsel can be heard, why they, and each of them, and their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization, should not be temporarily and permanently enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit N. Y. H.–21849, and the rights granted thereunder, and from holding any hearing on December 19, 1928, or at any time in the future requiring the plaintiff to show cause why it should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants and used by the plaintiff in the manufacture of its medicinal products under its permit N. Y. H.–21849, and from in any way, by hearings, letters, or otherwise, from enforcing or attempting to enforce sec. 218 of regulations 2 in so far as it purports to terminate on December 31, 1928, permits issued as valid until revoked.

And it appearing to the court from the specific facts shown in the verified complaint and the affidavits submitted to this court

121 that immediate, irreparable injury, loss, or damage will result to the plaintiff before notice of said motion can be served and a hearing had thereon, it is further

Service of this order and papers annexed hereto on or before 5 o'clock in the afternoon of Thursday the 13th day of December, 1928, shall be deemed sufficient service hereof.

FRANK J. COLEMAN, *U. S. D. J.*

122 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Affidavit of Andre Basil read in support of motion

STATE OF NEW YORK,
County of New York, Southern District of New York, ss.:

Andre Basil, being duly sworn, deposes and says, that I am the treasurer and secretary of the plaintiff in this action, and the defendants herein are the duly appointed, qualified, and acting officers of the United States of America in charge of the issuance of permits to use intoxicating liquors for nonbeverage purposes, as provided by the national prohibition act and the rules and regulations promulgated thereunder.

123 That the purpose of this action is to enjoin and restrain the defendants herein from terminating cancelling, and revoking a permit, N. Y. H.–21849, heretofore issued by a predecessor of the defendants herein, without a legal hearing as required by section 9 of Title II of the national prohibition act, and from holding a hearing on December 19, 1928, to require the plaintiff to show cause why the plaintiff should not use alcohol and other spirits instead of whiskey in the special formulæ heretofore approved by the defendants or their predecessor, and used by the plaintiff in the manufacture of its medicinal products under its permit N. Y. H.–21849.

The plaintiff is a corporation duly organized and existing under the laws of the State of New York and brings this section in its own right. Plaintiff is at the present time and at all times hereinafter mentioned was engaged in business at No. 228–230 Greenwich Street, in the borough of Manhattan, city and State of New York, and within this judicial district.

Heretofore, and on or about the 22nd day of November, 1925, in accordance with the provisions of the act of Congress of October 28, 1919, known as the national prohibition act, the plaintiff obtained from the United States of America, through its duly authorized agent, the then Prohibition Commissioner of the United States, Roy A. Haynes, in accordance with the rules and regulations theretofore prescribed by the Commissioner of Internal Revenue of the United States with the approval of the Secretary of the Treasury of the United States, a permit, designated N. Y. H.–21849,

124 to use intoxicating liquors in the manufacture of certain medicinal preparations listed on the application dated November 14, 1924, and marked approved by said Prohibition Commissioner. Said permit authorized the plaintiff to withdraw 500 wine gallons of alcohol, 200 wine gallons of whiskey, and 100 wine gallons of wine

per quarterly period. Said permit was amended on June 30, 1928, by Chester P. Mills, then Federal prohibition administrator for the Second District, to permit an increase in the withdrawal allowance of whiskey to 600 wine gallons per quarterly period. Said permit was further amended on June 18, 1928, by the defendant, Maurice Campbell, Federal prohibition administrator for the Second District, to authorize the plaintiff to include the manufacture of the preparations listed in an application dated May 11, 1928, and marked approved by said defendant, Maurice Campbell. Said permit was by its terms valid until revoked, its terms being provided for by section 260 of regulations 60, as more fully set forth in a photostatic copy of said permit N. Y. H.–21849 with the above amendments thereon, which is annexed hereto and made a part hereof as Exhibit 1.

At the time the plaintiff first applied for a permit to use intoxicating liquor in the manufacture of medicinal preparations, plaintiff, on August 20, 1924, filed a bond, as required by the national prohibition act and the regulations promulgated thereunder, satisfactory to the said Roy A. Haynes, then prohibition commissioner, in the amount of $25,000, said bond being sufficient to support
125 said permit within the requirements of the rules and regulations promulgated pursuant to the national prohibition act.

The aforesaid permit did not by its terms provide for its expiration at any specific date, but by its terms provided that it was subject to all the provisions of regulations 60 relating to permits and their effect. Regulations 60, which was promulgated by Roy A. Haynes, as Federal Prohibition Commissioner, and the defendant, David H. Blair, as Commissioner of Internal Revenue, and approved by the defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, on March 4, 1925, provided in section 260 thereof that while all other basic permits under said regulations 60, if issued prior to August 31 of any year, would expire on December 31 of that year, that all permits prefaced by the letter "H" should continue in full force and effect so long as the supporting bond required by regulations 60 remains in full force and effect or until cancelled, suspended, revoked, or voluntarily surrendered by the permittee.

The plaintiff, under the authority and in conformity with said permit N. Y. H.–21849, and in conformity with the national prohibition act and the rules and regulations promulgated thereunder, has, at all times herein mentioned, except during the interval hereinafter indicated in the paragraph designated "twelfth" in the bill of complaint herein, withdrew, on withdrawal permits issued by the then Federal Prohibition Commissioner of the United States or the then Federal prohibition administrator for the Second District, whiskey, alcohol, and wine under the authority of said permit
126 N. Y. H.–21849. Plaintiff used said whiskey, alcohol, and wine so withdrawn in the manufacture of pharmaceutical products in connection with plaintiff's business at No. 228–230 Green-

wich Street, in the borough of Manhattan, city and State of New York, the formulæ for such pharmaceutical products having, as hereinbefore alleged, been approved by the duly appointed, qualified, and acting officers of the United States then in charge of the issuance of permits under the national prohibition act.

Heretofore, on May 21, 1927, the plaintiff received a notice from the Federal prohibition officer of the Second District to show cause why the plaintiff's aforesaid permit N. Y. H.–21849 and its permit to use specifically denatured alcohol, S. D. A.–20158, should not be revoked, twelve charges being alleged in said notice. Thereafter, from June 10 to June 20, 1927, hearings were held in the office of the Federal prohibition administrator for the Second District before an agent of said Federal prohibition administrator. On August 30, 1927, the defendant, Maurice Campbell, issued an order sustaining six of the charges alleged in the aforesaid notice, and said defendant, Maurice Campbell, revoked the said permits of the plaintiff. Plaintiff then appealed to a "board of appeals" at the office of the defendant, Maurice Campbell, and thereafter, on November 12, 1927, received a notice from the defendant, Maurice Campbell, that said board had sustained the order revoking the said permits. On November 30, 1927, plaintiff instituted a suit in equity in this court against the defendants herein for the review and the reversal of the order of the defendant, Maurice Campbell, revoking the said
127 permits of the plaintiff. Said case docketed in this court as D. P. Paul & Co., Inc., against Andrew W. Mellon, Secretary of the Treasury, et al., E–43–352, came on to be heard at the December, 1927, term of this court before the Honorable Thomas D. Thacher, United States district judge, and after argument by counsel and upon consideration thereof, said Honorable Thomas D. Thacher rendered an opinion on January 16, 1928, reported in the 24th volume of the Federal Reporter, second series, at page 738. The Honorable Thomas D. Thacher held that the revocation of the plaintiff's permits by the defendant, Maurice Campbell, was not sustained by the evidence and that "the plaintiff has been seriously wronged by the decision of administrative officers which can not be reconciled with the exercise of that fair and impartial hearing and consideration which the law demands in all such [administrative] proceedings." A final decree was entered in said case on January 19, 1927, providing that the defendants in said action, the defendants herein, restore and recognize plaintiff's aforesaid permits with the same force and effect as if the same had not been revoked. Thereafter, in January, 1928, the defendant, Maurice Campbell, restored to plaintiff the said permits. For several months in 1927 and until on or about January 19, 1928, because of the aforesaid wrongful conduct of the defendants herein, the plaintiff was denied the right to withdraw or use any whiskey, alcohol, or wine under his aforementioned permit N. Y. H.–21849 or to withdraw or use specifically denatured alcohol under the aforesaid permit S. D. A.–20158.

On the 2nd day of September, 1927, the defendant, James
128 M. Doran, as Acting Commissioner of Prohibition, and the defendant, Andrew W. Mellon, through his assistant, Ogden L. Mills, then Acting Secretary of the Treasury, promulgated regulations 2 of the Bureau of Prohibition, being a revision of regulations 60 hereinbefore mentioned. Said regulations 2 became effective on October 1, 1927. Section 218 of said regulations 2 provided that all permits, including "H" permits, issued and in force and in effect on the effective date of said regulations 2 shall expire on December 31, 1928, unless renewed. Section 222 of said regulations 2 required that the renewal of all permits, including "H" permits, should follow the same procedure as in applications for original permits.

On the 27th day of July, 1928, plaintiff, in order to safeguard itself in the premises but without intending to waive any of its rights, filed an application with the defendant, Maurice Campbell, for the renewal of its said permit N. Y. H.-21849 for the year 1929.

On information and belief that on November 30, 1928, the defendant James M. Doran promulgated a circular, which was released on December 1, 1928, to all prohibition administrators, stating that all permittees now using whiskey and alcohol for manufacturing purposes and who have applied for the renewal of their permits should be notified immediately that they will be granted a hearing for the purpose of determining the necessity, if any, for the use of whiskey in their products. Said circular also stated that an opportunity should be afforded each permittee before the expiration date of his present permit to present such evidence as he can to establish
129 that no other spirits will properly serve for extraction and solution of the ingredients contained in his product or products, and for the preservation thereof, and that unless such facts can be clearly demonstrated the permittee's application for a permit to use whiskey for the year 1929 should be disapproved. A copy of said circular, as published by the Lawrence Law Service, Washington, D. C., is annexed hereto and made a part hereof as Exhibit 2.

Under date of December 6, 1928, the plaintiff received from the defendant, Maurice Campbell, a letter advising plaintiff that a hearing is scheduled for Wednesday, December 19, 1928, at 9 a. m., at No. 1 Park Avenue, New York City, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in plaintiff's special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof. A copy of this letter is annexed hereto and made a part hereof as Exhibit 3.

Plaintiff was incorporated in 1922, succeeding to the business partnership of D. P. Paul & Co., which has been in the business of manufacturing, distributing, and selling pharmaceutical products since 1890. The plaintiff has offices and laboratories in a five-story building at 228-230 Greenwich Street, borough of Manhattan, city of New York, and has a salesroom at 366 Fifth Avenue, borough

of Manhattan, city and State of New York. Plaintiff also owns a subsidiary corporation with an office and a factory in Paris, France. Plaintiff employs twenty to fifty employees in New York and, not counting the subsidiary corporation, has invested approximately $100,000 in its business.

130 Plaintiff, or its predecessor, has for many years past and plaintiff since obtaining its permit N. Y. H.–21849 has manufactured, distributed, and sold large quantities of pharmaceutical products and has acquired an extensive and very valuable good will for such pharmaceutical products manufactured by it. A large part of the pharmaceutical products which plaintiff has manufactured, distributed, and sold, and in connection with which it has acquired an extensive and very valuable good will have contained as an essential and necessary ingredient in the formulæ a percentage of whiskey, which either serves for extraction and solution of the ingredients contained in the products or serves the purpose of preserving the product, and neither alcohol or other spirits can be substituted by plaintiff for the whiskey used in the said special formulæ in the manufacturing of such pharmaceutical products. On information and belief, the defendants, Maurice Campbell and James M. Doran, herein well know that the whiskey used by plaintiff in the manufacture of its pharmaceutical products is necessary and essential for the special formulæ used by plaintiff, and the defendants herein, in fact, have approved, and the defendant, James M. Doran, personally approved, the said special formulæ used by the plaintiff when plaintiff applied for its permit in November, 1924, and when plaintiff subsequently applied for an amendment to its special formulæ on May 11, 1928. On information and belief that the attempt by the defendants herein to require the plaintiff to show cause why the plaintiff should not use alcohol or other spirits instead of whiskey in plaintiff's special

131 formulæ in the manufacture of its pharmaceutical products is aimed to harrass and embarrass the plaintiff. Such attempt, if permitted, will result in the loss to plaintiff of its very valuable good will.

No proceedings have been instituted or are now pending against the plaintiff for the revocation of its permit N. Y. H.–21849, or any other permit issued to the plaintiff pursuant to the national prohibition act, nor has the plaintiff at any time been charged with violating the national prohibition act or the rules and regulations promulgated thereunder, except as hereinbefore referred to in the paragraph of the bill of complaint herein designated "twelfth."

The plaintiff has not surrendered or cancelled the said permit N. Y. H.–21849, nor does plaintiff intend to do so. The said permit has not been revoked or cancelled by the defendants herein for violation of the provisions of the national prohibition act or the rules and regulations promulgated pursuant thereto.

The $25,000 bond, filed by the plaintiff on August 20, 1924, and which has at all times mentioned herein been filed with the defendants herein in support of the plaintiff's permit N. Y. H-21849, has been at all times since the issuance of said permit and is at the present time in full force and effect.

The action of the defendant in promulgating section 212 of regulations 2 and the actions of the defendants pursuant to such regulations in the issuance of the circular of November 30, 1928, and the demand that plaintiff appear at the office of the defendant,
132 Maurice Campbell, on Wednesday, December 19, 1928, are unjust, contrary to the national prohibition act, contrary to the Constitution of the United States and in absolute violation of sections 5 and 9 of Title II of the national prohibition act. The plaintiff has not been charged with any violations of the law, and said acts of the defendants have been issued in spite of the fact that the plaintiff has in every respect complied with the national prohibition act and the rules and regulations issued pursuant thereto.

Because of the aforementioned acts of the defendants herein the plaintiff may suffer great financial loss and irreparable damage, since plaintiff has made many contracts for the future delivery of its pharmaceutical products which, in accordance with the special formulæ approved by the defendants, must have as a necessary and essential element a percentage of whiskey. If the aforesaid acts of the defendants are not immediately enjoined, the plaintiff may lose many of its valuable customers and suffer very great damage thereby, for which there is no adequate remedy at law. Furthermore, to compel plaintiff to engaged in a hearing to show cause why it should not substitute alcohol for whiskey will put plaintiff to great and unnecessary anxiety and expense. Plaintiff will have to engage expert physicians and pharmacists as witnesses, employ legal counsel for a protracted period, suffer great inconvenience and harassment, and in many other ways be subjected to embarrassment.

Wherefore deponent prays that the relief prayed for in the bill of complaint, and particularly that the defendants herein, and
133 each of them and their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization be enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit N. Y. H.-21849, and the rights granted thereunder, and from holding any hearing on December 19, 1928, or at any time in the future, requiring the plaintiff to show cause why it should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants and used by the plaintiff in the manufacture of the medicinal products under its permit N. Y. H.-21849, and from in any way enforcing said sec. 218 of regulations 2.

Deponent further prays that this honorable court dispense with the usual notice of motion and grant an order on a date to be fixed therein and provide for service thereof accordingly.

Deponent further prays that pending the hearing of said motion this honorable court issue a restraining order enjoining and restraining the defendant and each of them, their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization, from in any manner interfering with the plaintiff in the use and enjoyment of its permit N. Y. H.-21849, and the rights granted thereunder, and from holding any hearing on December 19, 1928, or at any time in the future, requiring the plaintiff to show cause why it should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore ap-
134 proved by the defendants and used by the plaintiff in the manufacture of its medicinal products under its permit N. Y. H.-21849.

No other or previous application has been made for the order and relief herein prayed for.

A. BASIL, *Treas. & Secret.*

Subscribed and sworn to before me, this 13th day of December, 1928.

JOHN R. HAWTHORNE,
Notary Public, Queens Co.,
N. Y. Co. Clk's. No. 1080.

Statement as to the exhibits annexed to the affidavit of A. Basil: The exhibits annexed to this affidavit are the same as those annexed to the bill of complaint, and for that reason are not again printed in this part of the record.

135 In United States District Court

[Title omitted.]

Affidavit of Charles Dickerman Williams read in support of motion

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Charles Dickerman Williams, being duly sworn, deposes and says:

I am the attorney for the plaintiff in the above entitled action.

This is an action by the plaintiff, the holder of a permit issued to it on November 22, 1925, by Roy A. Haynes, then Prohibition Commissioner of the United States, who was the duly appointed, qualified, and acting officer of the United States at that time,
136 designated by law to issue such a permit, seeking to enjoin and restrain the defendants herein, who, at the present time, are the duly appointed, qualified, and acting officers of the United States in charge of granting and revoking permits under the national prohibition act and the rules and regulations promulgated thereunder.

As stated in the paragraph of the bill of complaint designated "fourth," the said permit by its terms did not provide for its expira-

tion at any specific date, but by its terms provided that it was subject to all the provisions of regulations 60 relating to permits and their effect. Regulations 60, which was promulgated by Roy A. Haynes, as Federal Prohibition Commissioner, and the defendant, David H. Blair, as Commissioner of Internal Revenue, and approved by the defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, on March 4, 1925, provided in section 260 thereof that while all other basic permits under said regulations 60, if issued prior to August 31 of any year, would expire on December 31 of that year, all permits prefaced by the letter "H" should continue in full force and effect so long as the supporting bond required by regulations 60 remains in full force and effect or until cancelled, suspended, revoked, or voluntarily surrendered by the permittee.

On the 2nd day of September, 1927, the defendant, James M. Doran, as Acting Commissioner of Prohibition, and the defendant, Andrew W. Mellon, through his assistant, Ogden L. Mills, then Acting Secretary of the Treasury, promulgated regulations 2 of the Bureau of Prohibition, being a revision of regulations
137 60 hereinbefore mentioned. Said regulation 2 became effective on October 1, 1927. Section 218 of said regulation 2 provided that all permits, including "H" permits issued and in force and in effect on the effective date of said regulation 2 shall expire on December 31, 1928, unless renewed. Section 222 of said regulation 2 required that the renewal of all permits, including "H" permits, should follow the same procedure as in obligations for original permits.

On information and belief that on November 30, 1928, the defendant, James M. Doran, promulgated a circular, which was released on December 1, 1928, to all prohibition administrators, stating that all permittees now using whiskey and alcohol for manufacturing purposes and who have applied for the renewal of their permits should be notified immediately that they will be granted a hearing for the purpose of determining the necessity, if any, for the use of whiskey in their products. Said circular also stated that an opportunity should be afforded each permittee before the expiration date of his present permit, to present such evidence as he can establish that no other spirits will properly serve for extraction and solution of the ingredients contained in his product or products and for the preservation thereof, and that, unless such facts can be clearly demonstrated, the permittee's application for a permit to use whiskey for the year 1929 should be disapproved. A copy of said circular, as published by the Lawrence Law Service, Washington, D. C., is annexed to the bill of complaint herein as Exhibit 2.

Under date of December 6, 1928, the plaintiff received from
138 the defendant, Maurice Campbell, a letter advising plaintiff that a hearing is scheduled for Wednesday, December 19, 1928,

at 9 a. m., at No. 1 Park Avenue, New York City, N. Y., for the purpose of determining whether or not whiskey is a necessary ingredient in plaintiff's special formulæ or whether alcohol or other spirits will properly serve for extraction and solution of the ingredients contained in such products and for the preservation thereof. A copy of this letter is annexed to the bill of complaint herein as Exhibit 3.

No proceedings have been instituted or are now pending against the plaintiff for the revocation of its permit N. Y. H.–21849, or any other permit issued to the plaintiff pursuant to the national prohibition act, nor has the plaintiff at any time been charged with violating the national prohibition act or the rules and regulations promulgated thereunder, except as hereinbefore referred to in the paragraph of the bill of complaint herein designated "twelfth."

The national prohibition act, section 9, Title II, provides that a permit issued under the national prohibition act may be revoked or canceled after fifteen days' notice by the service upon the permittee of a copy of a citation; the citation shall be accompanied by a copy of the complaint and the hearing shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred.

Because of the aforementioned acts of the defendants herein the plaintiff may suffer great financial loss and irreparable damage. Even the preparation for and conduct of a hearing will cause plaintiff much anxiety and expense.

139 Unless, therefore, a temporary restraining order is granted herein the permanent injunctive relief sought in the bill of complaint will be ineffective to preserve the rights and property of the plaintiff and the hearing ordered by defendant, Maurice Campbell, will take place on Wednesday, December 19, 1928, requiring the plaintiff to show cause why he should not use alcohol or other spirits instead of whiskey in the special formulæ heretofore approved by the defendants and used by the plaintiff in the manufacture of its medicinal products under the said permit N. Y. H.–21849 to plaintiff's great cost.

The reason an order to show cause is asked for instead of giving the usual notice of motion is that the defendants herein are taking immediate steps to hold the hearing on December 19, 1928, and to terminate, cancel, and revoke the plaintiff's said permit N. Y. H.–21849.

No other or previous application has been made for the order and relief prayed for herein.

CHARLES DICKERMAN WILLIAMS.

Subscribed and sworn to before me, this 13th day of December, 1928.

JOHN R. HAWTHORNE,
Notary Public, Queens Co.
N. Y. Co. Clk's. No. 1080.

140 In United States District Court

[Title omitted.]

Affidavit of Maurice Campbell read in opposition to motion.

Maurice Campbell, being duly sworn, deposes and says:

That I am Federal prohibition administrator for the Second District, comprising the Southern and Eastern Judicial Districts of the State of New York, and have occupied this position since July 1, 1927.

I have read the affidavit in support of the motion in the above action and have consulted the files of my office with reference thereof. In order better to familiarize the court with the nature of the business of the plaintiff company and in order to correct any impressions that might be drawn from the statement contained in the moving

141 papers to the effect that this company has been in business since 1890, deponent states that the records of his office show that the D. P. Paul Company was incorporated December 6, 1922, and that according to the certificate of incorporation the directors for the first year were Albert A. Arditti, subscriber to two shares of stock, David Arditti, subscriber to two shares, Beatrice Freiberg, subscriber to one share, and Diana Rebbey.

There was also incorporated December 14, 1921, a company known as A. A. Arditti Company, Inc., and according to the certificate of incorporation therein the directors for the first year were Anna Lauritano, subscriber to one share, David Arditti, subscriber to two shares, Beatrice Freiberg, subscriber to two shares, and Albert A. Arditti.

The language of the articles of incorporation of both of these concerns appears to be almost identical.

A permit was issued to A. A. Arditti & Co., Inc., as was also a permit issued to D. P. Paul & Co., Inc. The permit of A. A. Arditti & Co., Inc., however, was revoked after hearing under section 9, Title II, of the national prohibition act on charges of a failure to account for the disposition of 3,526 gallons of whiskey withdrawn under the permit held by the said company.

That the D. P. Paul Company was cited for revocation as set forth in the moving papers herein and that following the revocation of the permit a proceeding was instituted to review the revocation in the U. S. District Court, and the Honorable Judge Thacher directed the permit be reinstated because of insufficient evidence to warrant revocation.

142 The record in the said hearing discloses, however, that a party giving the name of David Ardith testified in the said revocation proceedings on behalf of the D. P. Paul Company, Inc., and that the said party giving the name of David Ardith was identified as David Arditti one of the incorporators of the D. P. Paul Company and one of the parties in interest in the A. A. Arditti Company whose permit had been revoked as hereinbefore stated.

Deponent further states that according to his records permit H-21849 was issued to the D. P. Paul Company, Inc., on January 2nd, 1925, and that the said permit contained the following proviso: "This permit is effective from the date hereof, and will remain in force unless revoked, suspended, or renewed as provided by law or regulations."

At the time permit was issued to plaintiff corporation the regulations in effect were regulations 60, revised March, 1924, section 260 of which provided that permits of the "H" classification did not have to be renewed.

Deponent, however, desires to trace the history of regulations relating to renewal of permits of the "H" classification. Following the passage of the national prohibition act the first edition of regulations 60, approved February 1, 1920, was issued. These regulations provided in section 18 thereof that "all permits provided by these regulations issued prior to August 31 of any year will expire on December 31 of that year, except permits to purchase, and all such permits
143 issued from September 1 to December 31 of any year will expire on December 31 of the following year unless otherwise provided." Pursuant to these regulations all permits under Title II of the national prohibition act except permits to purchase liquors were issued for yearly periods and expired by virtue of these regulations upon December 31 unless renewed.

It was not until March, 1924, that the commissioner waived the requirement to renew permits of the "H" classification. This was done by section 260 of regulations 60, revised March, 1924, wherein it was provided, as hereinbefore stated, that permits of the "H" classification need not be renewed.

Section 260 of regulations 60, revised March, 1924, was, however, again modified by the provisions of Treasury Decision 3773 approved November 14, 1925, which provided that all permits issued under Titles II and III of the national prohibition act should expire on December 31, 1925. Treasury Decision 3774, dated November 19, 1925, provided that "all 'H' permits or permits to use alcohol or other distilled spirits in manufacturing shall continue in effect until the 31st day of December, 1926. All applications for renewal of such permits for the year 1927 shall be filed prior to the 1st day of July, 1926." In pursuance of the requirements of Treasury Decisions 3773 and 3774 plaintiff in this action did file application for the renewal of its permit for the year 1927, which application was executed June 30, 1926, in conformity with the aforesaid regulations, and which application for renewal was filed without any protest whatsoever on behalf of the D. P. Paul Co., Inc., in so far as deponent's records show.

144 The said application for renewal, however, was not acted upon, for the reason that the commissioner, on September 1, 1926, promulgated Treasury Decision 3925, which dispensed with

the requirements of Treasury Decisions 3773 and 3774 on the renewal of permits.

The commissioner did, however, on September 2, 1927, promulgate regulations 2, which superceded prior regulations 60 and all modifications thereto, and required in section 218 thereof that all permits of the "H" classification should expire December 31, 1928, unless renewed.

Pursuant to section 218 of regulations 2 and on July 26, 1928, the plaintiff, D. P. Paul Co., Inc., again filed an application for the renewal of permit H-21849, which said application was filed without any protest whatsoever so far as deponent's records show.

In conformity with the said application of the plaintiff filed as aforesaid, your deponent addressed a letter to the D. P. Paul Co., Inc., on December 6, 1928, advising said company that a hearing was scheduled for December 19th, 1928, at which time said company was privileged to offer any testimony it saw fit bearing upon the necessity for the use of whiskey in preparations previously manufactured, and also any evidence bearing upon the merits of the application generally. It is the custom and practice of deponent, in conformity with the decision of the U. S. District Court in the Southern District of New York in the case of W. W. Smith v. Foster to give all permit applicants hearings prior to acting upon their applications, and it was in conformity with the decision in the W. W. Smith case that your deponent addressed the letter

145 aforesaid to the D. P. Paul Co., Inc., in connection with its application for a permit.

In view of the fact that plaintiff has been heretofore authorized to use whiskey in the manufacture of certain products upon condition that the whiskey would be converted into finished products in the presence of a representative of the prohibition administrator's office and that the plaintiff would notify the administrator as to the time when manufacturing was to take place, and in view of the further fact that your deponent's records indicate that plaintiff failed to conform to the requirements of this stipulation, your deponent is not in a position to state what action he would take upon the application for the renewal of the permit until a hearing has been concluded and the plaintiff accorded an opportunity to explain the situation.

Deponent states upon information and belief that application for renewal having been filed by plaintiff without protest the decision of the Circuit Court of Appeals for the Second Circuit in Higgins v. Foster, 12 Fed. (2d) 646, does not apply and that the case of Cywan v. Blair, 16 Fed. (2d) 279, is applicable to the application of plaintiff for permit renewal.

Deponent calls attention to the provision of plaintiff's permit which states that the said permit will remain in force "unless revoked, suspended, or renewed as provided by law or regulation." The regulations now require the renewal of such permits and de-

ponent states on information and belief that such regulations by virtue of their very issuance have become a part of this permit as though the same had been written therein in full. As stated heretofore, the permits of the "H" classification were originally
146 issued to expire annually and later the renewal requirements were waived. The regulations at present in effect, however, again require annual renewals and upon information and belief deponent states that the commissioner under the law having once regulated with respect to renewal of permits was not forever barred from changing his regulations but could change such regulations and issue new ones from time to time.

Deponent further states on information and belief that the permit involved in the Higgins case did not contain any such a restriction or proviso with respect to renewal as does the permit of the plaintiff herein, and deponent further states on information and belief that the application for the renewal of the permit involved in the Higgins case was filed under protest.

MAURICE CAMPBELL.

Subscribed and sworn to before me this 18th day of Dec., 1928.

[SEAL.] MICHAEL C. KEVENEY,
Notary Public,
Kings County Clerk's No. 529.

Commission expires March 30, 1929.

Statement as to service of and as to endorsement on the back of the affidavit of Maurice Campbell.

CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendants Except Defendant David H. Blair.

A copy was received by C. D. Williams, solicitor for plaintiff, on Dec. 19, 1928.

147 In United States District Court

[Title omitted.]

Affidavit of John E. O'Neill read in opposition to motion

CITY OF NEW YORK,
County of New York, State of New York, ss:

John E. O'Neill, of lawful age, being duly sworn, deposes and says: I am the counsel to the prohibition administrator for the Second District, comprising the Southern and Eastern Judicial Districts of the State of New York, and have been since April 20, 1926.

That I have examined the files in the prohibition administrator's office in the case of the William J. Higgins denaturing plant
148 and find that the permit heretofore held by the said William J. Higgins was issued on Form 1433 of the Treasury Depart-

ment and contained the provision that the said permit should continue in effect.

"* * * from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto." That a photostatic copy of the said permit is attached hereto and made a part of this affidavit.

That the files in the said case further disclose that William J. Higgins, on December 28, 1925, filed application on Form 1461 for the renewal of permit to operate a denaturing plant, which said application had written thereon the following:

"This application is made in compliance with T. D. 3773 and is in no manner to be construed as a surrender of our present permit."

Deponent also examined the files in the case of D. P. Paul and Company, Inc., plaintiff in this action and found therein copy of permit issued to D. P. Paul Company January 22, 1925, which permit contained the following proviso:

"This permit is effective from the date hereof and will remain in force unless revoked, suspended, or renewed, as provided by law or regulations. All provisions of regulations 60 relating to permits and their effect are to be considered part of this permit and to
149 be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law."

That the said permit was supported by a bond on Form 1530A, executed by the D. P. Paul Company as principal and the Eagle Indemnity Company as surety, which bond was executed August 20, 1924, and conditioned in part as follows:

"Now, therefore, the condition of this obligation is such that if the principal shall comply with the terms of said permit or permits, or permits supplementary thereto, or any modifications, extensions, or renewals thereof, and with the provisions of Title II of the national prohibition act, as at any time amended and supplemented; * * * then this obligation shall be void, otherwise to remain in full force and effect."

The said bond was superseded on February 21, 1928, by a new bond, Form 1530A, executed by the D. P. Paul Company, Inc., as principal and the Royal Indemnity Company as surety, which superseding bond likewise contained the same proviso as above quoted from the bond executed August 20, 1924.

150 Deponent further states that he has been designated by the prohibition administrator to conduct hearings on the renewal of permits and that he was prepared to hold a hearing on the application of plaintiff company for permit renewal at 9.00 a. m. Wednes-

day, December 19, 1928. That deponent at the request of C. D. Williams, Esq., attorney for D. P. Paul Company, Inc., has adjourned the hearing in the said matter to 10.00 a. m. Thursday, December 27th, 1928.

Deponent further states that one of the purposes of said hearing, among other things, is to determine whether or not plaintiff's permit should be renewed, and in accordance with circular letter dated November 30, 1928, from the Commissioner of Prohibition said hearing is also intended as a means of determining whether or not the present permit of plaintiff, if renewed, should be modified with respect to the substitution of alcohol for whiskey in certain medicinal preparations heretofore manufactured by the said company with the use of whiskey.

Deponent further states that he held a hearing on October 30, 1928, in connection with a change in the management and control of the plaintiff company and that following the said hearing he submitted a memorandum of what took place, a copy of which memorandum is attached to and made a part of this affidavit.

Deponent further states the records of the prohibition administrators office show that the change in the officers of plaintiff company as commented upon in the memorandum attached hereto
151 dated October 31, 1928, is still under investigation by the administrator's office and no final action has been taken with respect thereto.

JOHN E. O'NEILL.

Subscribed and sworn to before me this 18th day of Dec., 1928.

[SEAL.] MICHAEL C. KEVENEY,
Notary Public.

King's County Clerk's No. 511. New York County Clerk's No. 529. Commission expires March 30, 1929.

152 Treasury Department, U. S. Internal Revenue—Form 1433

Permit No. 108. Denaturing plant No. 139 (industrial alcohol or denaturing plant or bonded warehouse)

PERMIT TO OPERATE AN INDUSTRIAL ALCOHOL PLANT, DENATURING PLANT, OR BONDED WAREHOUSE UNDER TITLE III OF THE NATIONAL PROHIBITION ACT

OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 21, 1924.

To WILLIAM J. HIGGINS,
1346 Clinton Avenue, New York, New York.

Application and bond having been duly presented and approved, you are hereby authorized to operate a denaturing plant (industrial alcohol or denaturing plant or bonded warehouse) located at 1346 Clinton Avenue (street and number), New York (city), New York (State), and Serial Number 139 is assigned thereto.

This permit authorizes the operation of the above-described plant or warehouse, the purchase and receipt of alcohol thereat, and the removal therefrom of the manufactured product for any purpose authorized by law or regulations, from the date hereof until
153 surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto.

This permit is not transferable. By direction of the Commissioner of Internal Revenue.

R. A. HAYNES,
Prohibition Commissioner.

Memorandum annexed to affidavit of John E. O'Neill

OCTOBER 31, 1928.

From: Mr. O'Neill, legal advisor.
Re: D. P. Paul & Co., Inc.

Pursuant to your memorandum of October 17, 1928, I held a hearing on the D. P. Paul Co. on account of change in officers. From your memo it appears that the management of this company and its officers changed April 5, 1928, when Harry Greenspan became president, and that a change occurred again July 19, 1928, when Greenspan was succeeded by Harry Rosner.

The hearing in my office was set for October 29th, but at the request of the company's attorney I adjourned the case until October 30th. On the afternoon of October 29th there was delivered to me certified copy of the minutes of the D. P. Paul Co. meeting held on October 20th, 1928, from which it appears that the officers again changed on that date through the resignation of Harry Rosner as president and the election of Herman Feinberg in his stead.
154 The hearing on October 30th was attended by Mr. Feinberg and Andre Basil, secretary. Feinberg stated that he owns 33⅓rd per cent of the stock of the corporation which he purchased for $4,500 (R. 1), that the stock was delivered to him by Mr. Basil, and that he did not know who the previous holder of the stock was.

For the past three years Feinberg has been employed by the Greendale Company, bonded dealers of denatured alcohol, in Brooklyn, having first connected with that company in the summer of 1925. (R. 2.) He had no interest in the business, however, and was merely an employee having general duties around the plant. He was directly employed by Mr. Lesser, who paid him a salary of $40 a week. He resigned the last day of September from this company. (R. 3.)

Prior to 1925 he was working for the Diamond Wet Wash Company, 306 or 308 Penn St., Brooklyn, at a salary of about $35 a week. He was with this company about two years between 1923 and 1925. Prior to 1923 he was interested in a retail fruit store at Nassau and Newell St. in the Bronx. (R. 4.) This was betwee

1922 and 1923. Prior thereto he worked for a short time for the United Cigar Co. and in a restaurant. He also worked for about a year for the Electric Specialty Co., 363 Canal St., and between 1919 and 1922 he worked for A. Rosen & Co., auto accessory dealers, 610 Broadway. He was a salesman for this concern. (R. 5.)

Feinberg is 41 years old, was born in Cleveland Ohio, and has lived in New York State 41 years and in New York City 24
155 years. He attended public school in Troy, New York, and had to go to work when he was about 10 years of age. He never pursued any course of study since and has never been engaged in the business of manufacturing medicinal products or toilet preparations. (R. 6.) He is married and has resided at 1159 President St. for the past three years. Prior to that time he lived at 157 Penn St., Brooklyn.

His maximum earning capacity up to this time has been about $40 a week. He does not own any real estate. He has bank accounts in the Bank of Manhattan, 763 Nostrand Ave., Greenpoint Savings Bank, and Kings County Savings Bank, Eastern Parkway. The $4,500 used to purchase D. P. Paul stock was withdrawn from the Bank of Manhattan, and it was his own money he states. (R. 7.) He has never filed a Federal or State income tax return and states his earnings never warranted it.

All of the stock of the corporation which is issued is owned by Feinberg and Basil, the other officer. Feinberg says he does not know Harold Rosner, former president of the D. P. Paul Co., and never met him. He states, however, that he was present at the meeting on October 20, 1928, when he was elected president, and it appears from the certified copy of the minutes attached hereto and signed by Basil that the meeting was presided over by Harold Rosner, who tendered his resignation at that time.

Andre Basil states that he became connected with this company in 1922 as chemist at a salary of $40 to $50 a week. In 1926 he bought a third interest in the company (R. 10). The balance of the stock at that time was owned by Mr. Rebby. He and
156 Rebby controlled the corporation until April, 1928, when Rebby resigned and Greenspan took over Rebby's interest. Greenspan was apparently unable to meet the obligation and defaulted on notes (R 11) and the corporation through Basil took over the stock. Arrangements were then made with Rosner to purchase 66% of the stock in July. He also for some reason failed to meet the payments and then arrangements were made for the present president Herman Feinberg to purchase 33rd per cent of the stock, and the remaining 33rd per cent remains unissued. The corporation account is in the Fidelity Trust Co. Bank in Chambers St., where Basil said he deposited the $4,500 paid to him by Feinberg.

Basil has received from the corporation a salary of $50 a week and apparently has not up to this time shared in any profits. (R. 13.) Basil has a personal account in the Bronx Savings Bank (now Bank of America), where he has had an account for several

years. During this time he has had no other accounts in any other banks. He is a married man, age 43, and resides at 131 West Kingsbridge Rd., Bronx. He says he has been in this country for 24 years and was naturalized in 1916 in the Bronx Supreme Court.

Since coming to this country he has been employed in drug stores, etc. He showed me letters indicating that he was a junior clerk in a drug store at 1125 1st Ave. in 1905 and another letter indicating he was a junior clerk in Rubano's Pharmacy, 608 Crescent Ave., Bronx, in 1916, 1917, and 1918. He never procured a pharmacy license in New York State, however, and he is not a registered pharma-
157 cist. He stated he studied medicine for about three years in the University of Messina in Messina, Italy. This was just before he came to this country in 1905. (R. 15, 16, and 17.)

He says the corporation employs at the present time seven people and that he does the manufacturing. I asked him about Mr. Rosner, the former president, and he states he does not know where he resides nor where he works and could give me no information as to what his past employment or connection has been, although he is a close friend of his and Rosner boarded with him for some time. (R. 18, 19.)

The hearing record and the file are returned herewith for such investigation and other action as you may deem necessary.

JOHN E. O'NEILL,
Legal Advisor.

Statement as to service of and as to endorsement on the back of the affidavit of J. E. O'Neill:

CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendants Except Defendant David H. Blair.

A copy was received by C. D. Williams, solicitor for plaintiff, on Dec. 19, 1928.

158 In United States District Court

D. P. PAUL AND COMPANY, INC., PLAINTIFF AGAINST MAURICE CAMPBELL, FEDERAL PROHIBITION Administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, defendants	E. 47/229

Decree

Dec. 19, 1928

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is hereby

Ordered, adjudged, and decreed that, pending the final de-
159 cree in this action and until the further order of this court, the defendants above named, and their successors, and each of them, and their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization, are enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit NYH–21849, and the rights granted thereunder, and it is further

Ordered, adjudged, and decreed that plaintiff's motion, made upon an order to show cause granted December 13, 1928, for an order enjoining and restraining defendants from holding any hearing upon plaintiff's application for a new permit, on December 19, 1928, or at any other time, for the purpose of determining in connection with plaintiff's application for a new permit whether or not whiskey is a necessary ingredient in plaintiff's special formulæ, should be, and the same hereby is, in all respects denied.

FRANK J. COLEMAN,
United States District Judge.

160 In United States District Court

[Title omitted.]

Notice of appeal

SIR: Please take notice that the defendants, Maurice Campbell, Federal prohibition administrator for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue, and Andrew W. Mellon, Secretary of the Treasury of the United States, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of an order and interlocutory decree made and entered herein in the office of the clerk of this court on the 20th day of December, 1928, as provides:

161 "Ordered, adjudged, and decreed that, pending the final decree in this action and until further ordered and decreed, the defendants above mentioned, and their successors, and each of them, and their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization, are enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit NYH–21849, and the rights granted thereunder."

Dated New York, N. Y., January 11th, 1929.

Yours, etc.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Solicitors for Defendants.

Office & P. O. address, U. S. Courts & P. O. Bldg., New York City, N. Y.

To: CHARLES DICKERMAN WILLIAMS, ESQ.,
Solicitor for Plaintiff,
Office & P. O. address, 68 William Street, Borough of Manhattan, city of New York.

ALEXANDER GILCHRIST, Jr., Esq.,
Clerk of the District Court of the United States for the Southern District of New York.

162 Admission of service endorsed on the back of the notice of appeal: Service of a copy of the within is hereby admitted. New York, January 11, 1929.

CHARLES DICKERMAN WILLIAMS,
Attorney for Plff.

163 In United States District Court

[Title omitted.]

Petition for appeal and order allowing appeal

To the honorable judges of the United States District Court for the Southern District of New York:

Comes now Maurice Campbell, Federal prohibition administrator for the Southern District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, by their solicitor, Charles H. Tuttle, United States attorney for the Southern District of New York, and feeling aggrieved by
164 the order and interlocutory decree made and entered on the 20th day of December, 1928, by this court, in so far as said order and decree granted a motion by plaintiff for a temporary injunction and provides:

"Ordered, adjudged, and decreed that, pending the final decree in this action and until further ordered and decreed, the defendants above mentioned, and their successors, and each of them, and their assistants, agents, and attorneys, and any and every person acting or attempting to act by virtue of their authorization, are enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit NYH–21849, and the rights granted thereunder."

and complain that in the record and proceedings had in such cause manifest error has happened to the great damage of the petitioners as set forth in the assignments of error annexed hereto.

Wherefore the said defendants Maurice Campbell, Federal prohibition administrator for the Southern District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, and David H. Blair, Commissioner of Internal Revenue, do hereby appeal from said part of said decision, order, and decree of this

court to the Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order and
165 decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit and that the same may be corrected.

Dated New York, January 19, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York.

Appeal as prayed for is hereby allowed.

FRANK J. COLEMAN, *U. S. D. J.*

Dated New York, January 19, 1929.

166 In United States District Court

[Title omitted.]

Assignments of Errors

Comes now Maurice Campbell, Federal prohibition administrator for the Southern District of New York, James M. Doran, Commissioner of Prohibition of the United States, David H. Blair, Commissioner of Internal Revenue of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, the appellants herein, and file the following assignments of error upon which they will rely upon their appeal from that part of an order and interlocutory decree entered herein on December 20th, 1928, granting a motion by plaintiff for a temporary injunction:

167 1. The court erred in making and entering that part of the order and decree made and entered herein on December 20th, 1928, which reads as follows:

"Ordered, adjudged, and decreed that pending the final decree in this action and until further ordered and decreed, the defendants above mentioned, and their successors, and each of them, and their assistants, agents, an attorneys, and any and every person acting or attempting to act by virtue of their authorization, are enjoined and restrained from in any manner interfering with the plaintiff in the use and enjoyment of its permit NYH–21849, and the rights granted thereunder."

2. The court erred in holding that the court had jurisdiction to entertain plaintiff's motion and to grant any of the relief prayed for in the bill of complaint.

3. The court erred in holding that this suit was not prematurely instituted and that plaintiff might suffer irreparable damage by any threatened acts of the defendants.

4. The court erred in holding that the plaintiff did not have an adequate remedy at law.

5. The court erred in holding that the plaintiff did not surrender permit N. Y. H.–21849 as of December 31, 1928, and did not waive

any right the plaintiff may have had to object to and to contest the validity of that part of regulations No. 2 of the Bureau of
168 Prohibition of the Treasury Department of the United States, providing that "H" permits shall expire on December 31st, 1928.

6. The court erred in holding that that part of regulations No. 2 of the Bureau of Prohibition of the Treasury Department of the United States providing that "H" permits shall expire on December 31st, 1928, is an unauthorized, invalid, and illegal regulation, and that the plaintiff's said permit would continue in full force and effect after December 31st, 1928.

7. The court erred in holding that the defendant, David H. Blair, Commissioner of Internal Revenue of the United States, is a proper party defendant in this action and in granting the motion for an injunction against said defendant.

8. The court erred in holding that the Commissioner of Prohibition, by and with the approval of the Secretary of the Treasury of the United States, has no authority to amend the regulations issued under the provisions of the national prohibition act and the acts amendatory thereof and supplemental thereto, so as to provide that all permits of a certain class or classes issued without a specific expiration date, shall terminate at a specific time.

Wherefore appellants pray that the order and decree of the said court may be reversed, and in order that the foregoing assignments of error may be made part of the record the appellants present the same to the court and pray that such disposition may be
169–170 made thereof as is in accordance with the laws and statutes of the United States in such matters made and provided.

All of which is hereby submitted.

Dated New York, N. Y., January 19, 1928.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitors for Appellants.

Office and P. O. address, U. S. Courts and P. O. Bldg., New York, N. Y.

[Citation in usual form showing service on C. D. Williams omitted in printing.]

171 In United States District Court

[Title omitted.]

Stipulation as to the record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-

entitled matter as agreed on by the respective parties above named.

Dated March 1, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitor for the Defendants-Appellants.

CHARLES DICKERMAN WILLIAMS,
Solicitor for Plaintiff-Appellee.

172 [Clerk's certificate to foregoing transcript omitted in printing.]

173 In United States Circuit Court of Appeals for the Second Circuit

D. P. PAUL & CO., APPELLEE

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL., Appellants

Before: MANTON, L. HAND, and CHASE, Circuit Judges

C. D. Williams for the appellee; U. S. Grant for the appellants.

Opinion

Per curiam: Decree affirmed on the authority of Lion Company v. Campbell handed down herewith.

174 In United States Circuit Court of Appeals, Second Circuit

D. P. PAUL & CO., PLAINTIFF-APPELLEE

v.

MAURICE CAMPBELL, AS ADMR., ETC., ET AL., DEFENDANTS-APPELLANTS

Decree

Filed July 15, 1929

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

175 [File indorsement omitted.]

176 [Clerk's certificate to foregoing transcript omitted in printing.]

177 In United States District Court, Southern New York

Subpœna

Eq. vol. 47, page 300

The President of the United States of America to Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, greetings:

You are hereby commanded to appear before the judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity by W. H. Long & Co., Inc., and to further do and receive what the said court shall have considered in this behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, on the 31st day of December, in the year one thousand nine hundred and twenty-eight and of the independence of the United States the one hundred and fifty-second.

ALEX. GILCHRIST, Jr., *Clerk.*

LEWIS LANDES,
Solicitor for Plaintiff.

The defendants are required to file their answer or other defense in the above cause in the clerk's office on or before the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

178 In United States District Court for the Southern District of New York

W. H. Long & Co., Inc., plaintiff,
against
Maurice Campbell, Federal Prohibition Administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, defendants. | E. 47/300

Bill of complaint

The plaintiff complaining of the defendants, by Lewis Landes, its solicitor, respectfully alleges to this honorable court as follows:

First. That plaintiff is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, maintaining its offices and principal place of business at Nos. 49–51 Beach Street, Portchester, New York.

Second. That heretofore and on or about the 1st day of July, 1927, the defendant, Maurice Campbell, assumed his duties as Federal prohibition administrator for the Second District of New York, under and by virtue of an appointment and authority of the defendant, James M. Doran, Federal Prohibition Commissioner of the United States, and the said defendant, Maurice Campbell, did
179 assume and became vested, and is now the Federal prohibition administrator of the State of New York for the Second District, under and by virtue of the appointment of the defendant, James M. Doran, and is a resident of this judicial district, with full power to issue and grant permits and revoke permits, said power having been delegated to the said defendant, Maurice Campbell, by the Federal Prohibition Commissioner of the United States, James M. Doran, under and in conformity with the national prohibition act.

Third. That James M. Doran, one of the defendants, above named, is the Federal Prohibition Commissioner of the United States, and designated by the national prohibition act as the official whose duty it is to enforce the said act and all things incidental to and pertaining to said law, and that as such commissioner he has authority to designate the necessary subordinate officers, assistants, or agents for the purpose of aiding and assisting him in enforcing the national prohibition act and all things incidental to and pertaining to said law or act. That the defendant, James M. Doran, at all the times hereinafter mentioned had the authority to issue and revoke permits in conformity with the national prohibition act, and also the authority to issue permits for the withdrawal of alcohol to applicants applying for same in conformity with the national prohibition act.

Fourth. That the defendants herein described are sued in their official capacity only.

Fifth. That heretofore and on or about the 16th day of
180 August, 1923, in accordance with the provisions of the act of Congress of October 28, 1919, and known as the national prohibition act, the plaintiff obtained from the United States of America, through its duly authorized agent, the collector of internal revenue, at Albany, in the State of New York, in accordance with the rules and regulations theretofore prescribed by the Commissioner of Internal Revenue, and with the approval of the Secretary of the Treasury of the United States of America, a permit to operate and conduct a denaturing plant for the denaturing of grain alcohol, a copy of which is attached hereto and marked "Exhibit A" and made a part hereof.

Sixth. That heretofore and on or about the 10th day of July, 1928, the plaintiff's permit was revoked by the defendant, Maurice Campbell. That thereafter, and on or about the 11th day of July, 1928, an action was commenced in the United States District Court, Southern District of New York, for a review of the acts of the defendants in the revocation of plaintiff's permit.

Seventh. Thereafter, and on or about the 1st day of October, 1928, by order dated said day, it was ordered, adjudged, and decreed by this court that the plaintiff's permit be reinstated, with the full force and effect, as if same had never been revoked. Plaintiff respectfully refers to said order, with the full force and effect, as if spread at length hereon and made a part hereof.

Eighth. That thereafter such order was duly served upon the
181 defendants herein, but in spite of the service of said order the defendants have failed to reinstate the plaintiff's permit, although it is alleged that the defendants have reinstated the said permit.

Ninth. Heretofore and during or about the months of October or November, 1928, the defendant, James M. Doran, upon information and belief, issued an order to all administrators throughout the United States directing said administrators to require denaturing plant permittees to file new applications, at the same time giving in detail the particulars of its business and other items. Plaintiff respectfully refers to the order, upon information and belief, is now on file in the office of the defendant, Maurice Campbell, with the full force and effect, as if the same had been spread at length hereon and made a part hereof.

Tenth. Heretofore and during the month of December, 1928, the said Maurice Campbell in conformity with directions given to him by the defendant, James M. Doran, did communicate by mail with the plaintiff herein, at the same time enclosing an application form known as 1431, which form had been issued to permittees by the defendants herein. By said communication the defendants directed the plaintiff that its permit would expire on the 31st day of December, and that if it desired to use a new permit it would be necessary for it to file a new application for the year 1929.

Eleventh. In conformity with the directions of the defendants herein, and or about the 18th day of December, 1928, plaintiff did file an application for the renewal of its permit, at the same time notifying the said defendants that said application
182 was being filed without prejudice to the rights it had under permit heretofore issued by the prohibition authorities to it. A copy of said renewal application is attached hereto, marked "Exhibit B," and is referred to with the full force and effect as if spread at length hereon and made a part hereof.

Twelfth. Thereafter, and on or about the 27th day of December, 1928, the defendants notified the plaintiff that its application for renewal had been disapproved, although said application for renewal was made without prejudice or surrender of any of the rights of the plaintiff under its permit originally issued by the Prohibition Department. A copy of said letter of disapproval is attached hereto, marked "Exhibit C" and referred to with the full force and effect as if the same had been spread at length hereon and made a part hereof. Bond in the sum of $100,000 was filed by plaintiff corporation herein.

Thirteenth. Plaintiff further alleges that no proceedings have been instituted against it for the revocation of its permit, nor has it at any time been charged with violation of the national prohibition act or the rules and regulations promulgated thereunder, nor is the plaintiff now under revocation proceedings or on trial for any violations of the national prohibition act, except as heretofore described.

Fourteenth. Plaintiff has invested in its business many thousands of dollars, which consists of equipment, miscellaneous items, etc., all of which is well known to the defendants herein.

183 Fifteenth. That the permit which the defendants have issued to the plaintiff corporation specifically provides that same shall continue in effect until surrendered by the plaintiff or cancelled by the Commissioner of Internal Revenue for violations of the provisions of the national prohibition act and regulations promulgated thereunder.

Sixteenth. The plaintiff has not surrendered or cancelled its permit, nor does it intend so to do, nor has the permit been revoked or cancelled by the defendants herein for violation of the provisions of title 3 of the national prohibition act or the regulations made pursuant thereto.

Seventeenth. That the permit as issued to the plaintiff herein by defendants is a vested and valuable property right under which property right the plaintiff has expended considerable money, and that the only method that is available to the defendants to deprive the plaintiff of its property rights and the permit which has been granted it is for a violation of the national prohibition act or the rules and regulations promulgated thereunder or by surrender voluntarily.

Eighteenth. The national prohibition act and amendments specifically provides that the commissioner shall not revoke a permit except upon the filing of charges and the granting of a hearing, which hearing must be held within the judicial district where the violation is alleged to have taken place, and that only after a hearing and notice of such hearing being given to the plaintiff by the defendants
184 of the charges which have been preferred against it and the taking of testimony and findings of fact can the plaintiff's permit be revoked, and that there must be legal and competent evidence introduced justifying a revocation.

Nineteenth. The Constitution of the United States provides that no person shall be deprived of his life, liberty, or property without due process of law, and under these orders the property and vested rights of the plaintiff herein will be taken and without due process of law.

Twentieth. That the acts on the part of the defendants herein are contrary to the Constitution of the United States of America, the national prohibition act, and the rules and regulations as promulgated thereunder.

Twenty-first. That the provisions of section 9, title 2, of the national prohibition act and the other sections of the act applicable thereto are mandatory and must be complied with literally by both the defendants and the plaintiff, and the permit of the plaintiff herein can not lawfully be revoked nor can the plaintiff be deprived of its permit, except upon violations of law and as provided for in the national prohibition act, and in order to be revoked by the defendants such violations must be sustained by legal and competent testimony.

Twenty-second. That the action of the defendants in refusing the application for permit of the plaintiff is unjust, contrary to the national prohibition act, contrary to the Constitution of the
185 United States, and in absolute violation of sections 5 and 9 of the national prohibition act, title 2, and that the plaintiff has not been charged with any violations of the law and said acts of the defendants have been issued in spite of the fact that the plaintiff corporation has in every respect complied with the national prohibition act and the rules and regulations promulgated thereunder, and because of the acts of the defendants in acting controry to the law in the refusal of the plaintiff's permit and in not allowing to plaintiff to conduct its business the plaintiff has suffered and is now suffering great financial loss and irreparable damage; plaintiff will continue to lose customers and suffer very great damage thereby, for which there will be no remedy in law.

Twenty-third. That on or about the 14th day of November, 1928, the plaintiff filed an application on Form 1463 for the withdrawal of denatured alcohol in conformity with basic permit heretofore issued to it by the defendants herein. A copy of said application is attached hereto, marked "Exhibit D" and referred to with the

full force and effect as if the same had been spread at length hereon and made a part hereof.

Twenty-fourth. That thereafter and on or about the 27th day of December, 1928, the plaintiff was notified by the defendants that said application for permission to withdraw alcohol had been denied. A copy of said letter of disapproval is attached hereto, marked "Exhibit E," and referred to with the full force and effect as if the same had been spread at length hereon and made a part hereof.

186 Twenty-fifth. That the acts of the defendants in refusing plaintiff corporation to withdraw alcohol in conformity with its permit is illegal, contrary to law, and contrary to the terms and conditions of the permit issued by the defendants to the plaintiff herein.

Wherefore plaintiff respectfully prays as follows:

1. That a writ of subpœna issue to the defendant, Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, commanding them and each of them to appear and make answer thereto.

2. That the court enter a final decree or order permanently restraining the defendants from in any manner interfering with the plaintiff in the use and enjoyment of its permit and the rights granted thereunder.

3. That the court issue a temporary injunction restraining the defendants and each of them herein from in any manner interfering with the use and enjoyment of the plaintiff of its permit until the final hearing and determination of the issues in this proceeding.

4. That the court enter a final decree or order permanently restraining the defendants from in any manner interfering with the plaintiff in the use and enjoyment by it of its permit or operation of its plant until such time as its permit may be properly revoked in accordance with the provisions of the national prohibition act.

187 5. That the defendants be enjoined from refusing to honor withdrawal permit submitted by the plaintiff in conformity with the national prohibition act and the regulations promulgated thereunder and that if this honorable court finds that the plaintiff is not entitled to an injunction as prayed for herein it review in accordance with the national prohibition act the actions of the defendants in revoking the plaintiff's permit and the actions of the defendants in refusing to renew the permit of the plaintiff in conformity with the national prohibition act and the rules and regulations promulgated thereunder, and that if this honorable court finds that the defendants have improperly, unjustly, or illegally and not in conformity with the national prohibition act revoked the plaintiff's permit or refused to reissue his permit, that it issue an order

or decree directing the defendants to forthwith restore the plaintiff's permit, and further ordering and decreeing and restraining the defendants from in any manner interfering with the enjoyment of the permit issued to the plaintiff herein, with the exception of instituting revocation proceedings in accordance with the provisions of the law.

6. That the court enter a final decree prohibiting the defendants or each of them from in any manner refusing the permit of the plaintiff, except for a violation of the provisions of title 3 of the national prohibition act or the regulations made pursuant thereto.

7. That this court review the acts of the defendants herein
188 in refusing to renew the application of the plaintiff filed in conformity with applications attached hereto (marked as exhibits), and that upon a review to issue a decree or other directing the defendants herein to renew the permit of the plaintiff for a denaturing plant, as more fully set forth herein.

8. That the plaintiff have such other and further relief as to this court may seem just and proper in the premises.

Yours, etc.,

LEWIS LANDES,
Solicitor for Plaintiff.

Office and P. O. address, No. 233 Broadway, borough of Manhattan, city of New York.

189 *Exhibit A to complaint*

Form 1433. Permit No. 91

Treasury Department, U. S. Internal Revenue—Denaturing plaint No. 123

PERMIT TO OPERATE AN INDUSTRIAL ALCOHOL PLANT, DENATURING PLANT, OR BONDED WAREHOUSE UNDER TITLE III OF THE NATIONAL PROHIBITION ACT

OFFICE OF THE COMMISSIONER OF
INTERNAL REVENUE, WASHINGTON, D. C.,
August 16, 1923.

To: W. H. LONG & COMPANY, INC.,
49–51 Beach Street, Portchester, New York.

Application and bond having been duly presented and approved, you are hereby authorized to operate a denaturing plant located at 49–51 Beach Street, Portchester, New York, and serial number 123 is assigned thereto.

This permit authorizes the operation of the above-described plant or warehouse, the purchase and receipt of alcohol thereat, and the removal therefrom of the manufactured product for any purpose authorized by law or regulations, from the date hereof until sur-

rendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto.

This permit is not transferable.

JAMES A. JONES,
Actg. Prohibition Commissioner.

190 *Exhibit B to complaint*

RENEWAL. APPLICATION FOR PERMIT TO OPERATE INDUSTRIAL ALCOHOL PLANT, BONDED WAREHOUSE, AND DENATURING PLANT WITHOUT PREJUDICE TO ORIGINAL PERMIT UNDER TITLE III OF THE NATIONAL PROHIBITION ACT

NEW YORK, *December 18th, 1928.*

To: PROHIBITION ADMINISTRATOR, SECOND DISTRICT.

Application is hereby made by W. H. Long & Co., Inc., a domestic corporation, having its principal place of business at Nos. 49–51 Beach Street, Portchester, New York, for permit to operate denaturing plant (permit now in existence) under the name or style of W. H. Long & Co., Inc., in accordance with the provisions of Title III of the national prohibition act and regulations promulgated thereunder on the premises located at 49–51 Beach Street, Portchester, New York, owned by W. H. Long & Co., Inc.

Number and horsepower of boilers (if on the premises): None.

Number of mash tubs and cubic contents of each tub in gallons: None.

Disapproved, Dec. 27, 1928.

MAURICE CAMPBELL,
Fed. Pro. Adm., 2nd Dist., N. Y.

Number of fermenting tubs, designated by serial number and cubic contents of each tub in gallons: None.

191 Particular description of the lot or tract of land on which the industrial alcohol plant, bonded warehouse, or denaturing plant are situated: 49–51 Beach Street, Portchester, New York, one stone and brick one-story attic building.

Size and description of bonded warehouse and denaturing plant (including material storage room): One material storage room 15 ft. by 19 ft. and in addition thereto a space about 15 ft. by 15 ft. in which are located 5 material storage tanks which have been installed since the approval of our original application; bonded warehouse, 75 feet long, 18 feet wide, 10 feet high; denaturing plant, 81 feet wide by 41 feet deep.

The following utensils owned by W. H. Long & Co., Inc., will be used in the bonded warehouse and denaturing plant, viz.:

Bonded warehouse: receiving tanks, capacity wine gallons; storage tanks, capacity wine gallons; weighing tanks, capacity wine gallons.

Denaturing plant: 5 denaturing material storage tanks, capacity 550 wine gallons; 1 alcohol storage tanks, capacity 2,300 wine gallons; 8 mixing tanks, capacity 700 wine gallons; 1 weighing tanks, capacity 120 wine gallons; 0 stills, capacity wine gallons.

Estimated quantity of alcohol to be received during a period of thirty days in proof gallons, 100,000.

Bonded warehouse 75 x 18; denaturing plant 81 x 41.

Size and description of all buildings on the industrial alcohol plant premises and material of which constructed other than the bonded warehouse or denaturing plant: None.

192 Statement of present condition of title, industrial alcohol plant, or bonded warehouse (section 3262, Revised Statutes U. S.):

The applicant fully understands that the permit to be issued hereon will contain the following stipulations and conditions, all of which he promises will be faithfully observed and performed, and that any act done or omitted to be done contrary to the terms and intent of such stipulations and conditions, or any misrepresentation of any fact found to have been made in securing the permit, shall be deemed a lack of good faith in conforming to the provisions of the national prohibition act, as amended and supplemented, and shall constitute good cause for the issuance of a citation and the revocation of said permit:

1. That he and all persons employed by him in any connection with such permit privileges, and all other persons employed by him while on the permit premises, will in good faith observe and conform to all the terms and conditions of said permit; all laws of the United States relating to the manufacture, taxation, and control of, and traffic in, intoxicating liquors; all regulations made pursuant to law which are now, or may hereafter be, in force; and all the liquor laws of the State in which the permittee's business is located and of all States in which the permit privileges may be exercised.

2. That he will provide and maintain, on the premises described herein and covered by any permit issued hereon, a safe and secure place of storage for all alcohol or denatured alcohol produced or possessed under authority of such permit, same to be of sufficient capacity to hold the maximum quantity of alcohol or denatured alcohol which may be so possessed by applicant at any one time, and to be kept under Government lock, and to be subject to inspection and approval of the administrator; that a correct description of the place of storage has been given herein; and that all alcohol or denatured alcohol received, manufactured, or possessed by authority of said permit will be stored and kept in the place of storage described.

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3. That he will keep the files and records pertaining to the business conducted under his permit on the premises covered by the permit and will make all reports required of him by law or regulation and will,

upon proper request, promptly allow and permit inspection to be made by any official or officer of the Bureau of Prohibition of such files and records, and of all the premises and property used for or in connection with any operations under said permit, including the stocks of alcohol or denatured alcohol on hand, and all vehicles passing into or out of said premises.

4. That the actual management of the business and operations to be carried on under said permit will be under the direct charge and supervision of Thomas J. Dwyer and Daniel Cohen, whose business address is 49–51 Beach Street, Portchester, New York; if a change is made in the management of said business and operations notice thereof, stating the name and address of the new or additional manager, shall be sent by registered mail to the administrator of the district in which the permit was issued; if the administrator, within 15 days after receipt of such notice, shall notify the permittee that
194 he disapproves such new or additional manager, such change in management shall not thereafter be effective as to the permit privileges.

5. That in the event the applicant is a corporation there shall be filed with this application an affidavit stating the names and business addresses of the officers and directors of such corporation, and, if required by the Administrator, an additional statement showing the name and address of each stockholder therein holding as much as 10 per cent of the stock of such corporation now issued and outstanding. In the event of any change in the officers or directors of said corporation it will immediately notify the administrator of the district in which the permit is issued of such change. If such change in such officers or directors effects a change in the management of its operations under the permit, notice thereof must be given to administrator by registered mail, and such change may become ineffective as to the permit privileges by the disapproval of the administrator as provided in paragraph 4.

6. That the permit privileges herein applied for if granted shall not be transferred, and in case of sale or transfer of the business in connection with which the permit activities are conducted he will submit to the administrator a statement, under oath, showing the name and address of the purchaser and any other person directly or indirectly interested in the enterprise, the amount paid for the business, the balance due, if any, and how secured. That if applicant is a corporation, and the permit herein applied for is granted, any sale, pledge, or other disposition of its corporate stock which
195 results in transferring thhe control and management of the business of the corporation shall terminate such permit. That if applicant is a partnership, the sale of a partnership interest shall be deemed to be a sale or transfer of the business.

The applicant hereby certifies that he and all persons interested in the business to be conducted under said permit are duly qualified

under the law and regulations pertaining thereto to receive the permit privileges herein applied for.

All data, written statements, affidavits, and other documents submitted in support hereof shall be deemed to be part of this application.

W. H. LONG & CO., INC.,
By THOMAS J. DWYER, (SEAL),
President.

Subscribed and sworn to before me this 18th day of December, 1928.

[SEAL.] MEYER KAPLAN,
Notary Public, Bronx Co.

Office of the Prohibition Administrator.

——— DISTRICT OF ———,
———, *19*—.

I hereby certify that I have caused to be examined the premises herein described and find the statements and descriptions given to be true in every particular; that the said premises are in strict compliance with all requirements of law and regulations. The application is therefore approved.

———,
Administrator.

196 *Exhibit C to complaint*

TREASURY DEPARTMENT, U. S. PROHIBITION SERVICE,
New York, N. Y., December 27, 1928.

Pro: LA
JEO.FL

W. H. LONG & CO., INC.,
49–51 Beach Street, Port Chester, N. Y.

GENTLEMEN: There is enclosed herewith, marked "Disapproved," one copy of application, dated December 18th, 1928, on Form 1431, for renewal of permit to operate a denaturing plant at Port Chester, N. Y.

This application is disapproved for the reason that the present personnel of your organization is not regarded as worthy of the confidence of this department because of lack of financial responsibility, lack of experience in conducting the business of a denaturing plant, and because of your failure to present to me evidence from which I could conclude that your corporation is entitled to the privileges applied for.

Yours very truly,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

Encl.

197 *Exhibit D to complaint*

APPLICATION OF PROPRIETOR OF DENATURING PLANT FOR PERMIT TO PROCURE ALCOHOL UNDER TITLE III OF THE NATIONAL PROHIBITION ACT

PORT CHESTER, N Y., *November 14, 1928.*

To PROHIBITION ADMINISTRATOR,
2nd District of New York.

The undersigned holder of Permit No. 91, operating denaturing plant No. 123, located at 49–51 Beach Street, Port Chester, New York, hereby makes application for permit to procure 100,000 proof gallons of alcohol for denaturation or other tax-free purposes as provided by law and regulations.

A bond in the penal sum of $100,000 has been filed and approved.

Said alcohol is to procured from American Commercial Alcohol Corporation, proprietor of bonded warehouse No. 29, in the 5th District of Pennsylvania.

[LONG SEAL.]

W. H. LONG & CO., INC.,
DANIEL COHEN,
Secretary-Treasurer.

Disapproved Dec. 27, 1928.

MAURICE CAMPBELL,
Federal Prohibition Administrator,
2nd District of New York, N. Y.

198 *Exhibit E to complaint*

TREASURY DEPARTMENT, U. S. PROHIBITION SERVICE,
New York, N. Y., December 27, 1928.

PRO:LA
JEO.FL

W. H. LONG & CO., INC.,
49–51 Beach Street, Port Chester, N. Y.

GENTLEMEN: I am returning herewith marked "Disapproved" one copy of your application dated November 14th, 1928, on Form 1463 for a permit to procure 100,000 proof gallons of alcohol for denaturation purposes.

This application for a permit has been disapproved for the reason that the present personnel of your organization is not regarded as worthy of the confidence of the department, and for the further reason that you have not presented to me sufficient evidence as to satisfy me that the alcohol applied for, if granted, would be used legitimately.

Yours very truly,

MAURICE CAMPBELL,
Federal Prohibition Administrator.

199 [*Duly sworn to by Thomas J. Dwyer; jurat omitted in printing.*]

200 In United States District Court

[Title omitted.]

Answer

The defendants by their solicitor, Charles H. Tuttle, United States attorney for the Southern District of New York, answering the bill of complaint herein:

I. Admit upon information and belief the allegations contained in the paragraphs of the bill of complaint designated "first," "fourteenth," and "sixteenth."

II. Admit the allegations contained in the paragraphs of the bill of complaint designated "second," "third," "fourth," "fifth," "sixth," "seventh," "ninth," "tenth," "eleventh," "twelfth," "thirteenth," "fifteenth," "twenty-third," and "twenty-fourth."

III. Deny each and every allegation contained in the paragraphs of the bill of complaint designated "eighth" and "twentieth."

201 IV. Deny upon information and belief each and every allegation contained in the paragraphs of the bill of complaint designated "seventeenth" and "twenty-fifth."

V. Admit the allegations contained in the paragraph of the bill of complaint designated "nineteenth," except that defendants deny that the plaintiff has any vested property rights under the permit referred to in the bill of complaint and that plaintiff has been or will be deprived of any property or vested rights by reason of any acts of the defendants.

VI. As to the allegations contained in the paragraph of the bill of complaint designated "twenty-first," the defendants deny upon information and belief that section 9 of Title II of the national prohibition act confers any jurisdiction upon the court to review the acts of the defendants or to determine the validity of the regulation referred to in the bill of complaint and further deny upon information and belief that plaintiff's permit can not lawfully terminate except in the manner provided in section 9 of Title II of the national prohibition act.

VII. Deny upon information and belief each and every allegation contained in the paragraph of the bill of complaint designated "twenty-second," except that defendants admit that plaintiff has not been charged with any violation of the law.

202 For a first separate and distinct defense to any cause of action alleged in the bill of complaint, the defendants, by their solicitor, upon information and belief allege—

VIII. That plaintiff is attempting to allege as a single cause of action three separate and distinct alleged causes of action, to wit, an action against the defendants as individuals for an injunction restraining them from carrying out an alleged unauthorized and alleged illegal regulation, an action against the defendants as officers and agents of the United States under the provisions of sections 5

and 6 of Title II of the national prohibition act to review the refusal of an application for a purchase permit filed with the defendant prohibition administrator by the plaintiff, and an action against the defendants as officers and agents of the United States to review their refusal to issue to plaintiff a denaturing plant permit for the year 1929; that the said causes of action are inconsistent in that the first two aforementioned alleged causes of action are based upon the assumption that plaintiff's permit No. 91 did not expire on December 31, 1928, and the last-mentioned alleged cause of action is based upon the assumption that plaintiff's said permit did terminate on December 31, 1928; that in the first-mentioned alleged cause of action the defendants are necessarily sued as individuals, while in the other two alleged causes of action the defendants are sued as officers of the United States and said actions are in effect actions against the United States instituted under the statuory authority of sections 5 and 6 of Title II of the national prohibition act; that said
203 alleged causes of action should be separately stated and numbered and are improperly joined in one bill of complaint.

For a second separate and distinct defense to any cause of action alleges in the bill of complaint the defendants, by their said solicitor, upon information and belief allege—

IX. That the plaintiff on or about December 18, 1928, filed, without prejudice to the original permit, with the defendant prohibition administrator, Maurice Campbell, an application for a renewal of its denaturing plant permit for the year 1929 in accordance with the provisions of regulations No. 3 of the Bureau of Prohibition of the Treasury Department and a copy of said application, marked "Exhibit B," is annexed to the bill of complaint; that thereafter the defendants caused an investigation to be made of plaintiff and afforded plaintiff an opportunity at a hearing held in the office of the prohibition administrator to present all of the facts that would warrant the granting of said application; that after considering all of the facts, the defendants determined that plaintiff was not entitled to a permit for the reasons stated in a letter to the plaintiff under date of December 27, 1928, a copy, of which, marked "Exhibit E," is annexed to the bill of complaint, which letter was sent to the plaintiff informing plaintiff of the disapproval of the application; that plaintiff by its said action in filing said application and in instituting this action to review the refusal of the defendants to issue a renewal permit have acquiesced in the provisions of said regulation No. 3 providing for the termination of its permit on December
204 31, 1928, and has thereby surrendered its permit; that plaintiff has waived by its said action any rights it may have had to object to the provisions of said regulations No. 3 providing for the termination of its permit on December 31, 1928, unless a renewal permit was granted; and that the plaintiff is estopped from contending that said provisions of regulations No. 3 are invalid.

For a third separate and distinct defense to any cause of action alleged in the bill of complaint the defendants, by their solicitor, upon information and belief allege—

X. That heretofore the plaintiff applied to the proper officers of the United States for a permit to operate a denaturing plant and obtained such a permit, a copy of which, marked "Exhibit A," is annexed to the bill of complaint; that article 95 of regulations No. 3 of the Bureau of Prohibition of the Treasury Department of the United States was duly promulgated and issued subsequent to the date of issuance of said permit and provides in substance that denaturing plant permits would expire on December 31, 1928; that said section of regulation No. 3 is an existing, valid, and reasonable regulation; that by reason of article 95 and the other provisions of regulations No. 3 the plaintiff's said permit expired on December 31, 1928.

XI. That on or about December 18, 1928, in accordance with the provisions of the said regulations No. 3, the plaintiff filed with the defendant prohibition administrator an application for a renewal of its permit for the year 1929, a copy of which application,
205 marked "Exibit B," is annexed to the bill of complaint; that thereafter, in accordance with the usual procedure followed by the prohibition administrator, an investigation was made as to the qualification of the plaintiff to hold a denaturing plant permit and plaintiff was afforded an opportunity at a hearing held before a representative of the prohibition administrator in the office of the prohibition administrator to present all the evidence showing that plaintiff was entitled to the permit applied for; that plaintiff appeared at said hearing by its officers and representatives; that the administrator, after considering reports made to him by his agents of investigations conducted by its agents, a report of the testimony and proceedings had at said hearing, and the written recommendations of his legal advisor, all of which appear in the record filed herein by the defendants in opposition to a motion for a temporary injunction and is referred to with the same force and effect as though here set forth at length, determined that the plaintiff was not entitled to the permit applied for because of lack of financial responsibility, lack of experience of the plaintiff's present officers and stockholders in the business of a denaturing plant, and the lack of evidence of a legitimate business, and so informed plaintiff by a letter, a copy of which, marked "Exhibit C," in annexed to the bill of complaint; that the defendants are given the discretionary power and duty under the provisions of the national prohibition act and the acts supplemental thereto and amendatory thereof to grant or refuse applications for permits of the kind filed by plaintiff; that the defendants believe that plaintiff's application is not filed in good faith
206 for the purpose of obtaining a permit under which to conduct a legitimate business; and that if plaintiff obtains the permit

applied for that plaintiff will use the alcohol obtained thereby for illegal uses and purposes and will assist other permittees in the diversion of denatured alcohol for unlawful uses and purposes and therefore refused to issue the permit and their action in so doing is authorized by law.

XII. That on or about November 14, 1928, the plaintiff filed an application on Government Form 1463 for a permit authorizing the purchase of 100,000 proof gallons of alcohol for use in the manufacture of denatured alcohol under the provisions of its then existing denaturing plant permit; that in accordance with the provisions of regulations No. 3 of the Bureau of Prohibition of the Treasury Department of the United States the administrator requested the plaintiff to submit evidence in the form of orders showing that the plainiff needed said alcohol for legitimate business purposes; that the plaintff submitted an alleged order from which it appeared that if the plaintiff sold the denatured alcohol to the party alleged to have ordered the alcohol the plaintiff would suffer a substantial financial loss; that the administrator afforded the plaintiff an opportunity at a hearing held before his representative at the office of the prohibition administrator to present any facts showing that the plaintiff needed the alcohol applied for for legitimate business purposes; that plaintiff's sole stockholder and president of plaintiff admitted at said hearing that plaintiff would suffer a financial loss if said order was actually filled by plaintiff; that the defendants by
907 reason of said fact and the facts appearing in said record referred to in the preceding paragraph herein determined that the plaintiff did not actually intend to use said alcohol for the purpose of manufacturing denatured alcohol to be sold to the person claimed to have so ordered it and that plaintiff would not use said alcohol when obtained for legitimate business uses but would divert said alcohol either as pure alcohol or as denatured alcohol to illegal uses and purposes and therefore refused to issue the purchase permit applied for; that the defendants are given the discretionary power and duty to grant or to refuse to grant applications for purchase permits and that their action in refusing to issue the said purchase permit to plaintiff was authorized by law.

Wherefore defendants demand judgment dismissing the bill of complaint herein and for costs and disbursements.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for Defendants.

Office & P. O. address, U. S. Courts & Post Office Bldg., Borough of Manhattan, city of New York.

908 [*Duly sworn to by Maurice Campbell; jurat omitted in printing.*]

209 In United States District Court

[Title omitted.]

Statement of the evidence

Before Honorable FRANK J. COLEMAN, District Judge

NEW YORK, *February 21st, 1929.*

Appearances of counsel

Lewis Landes, solicitor and counsel for plaintiff; Charles H. Tuttle, United States attorney, solicitor for defendants, Ulysses S. Grant, assistant United States attorney, counsel.

Prima facie proofs

Mr. LANDES. I move that paragraph 5 of the prayer for relief in the bill in equity be amended by striking out that part of
210 the paragraph commencing with the words, "And that if this honorable court finds that the plaintiff is not entitled to an injunction," and ending with the words, "in accordance with the provisions of the law."

Mr. GRANT. In connection with that application, if the court please, I wish to make a motion that the bill of complaint be dismissed on the ground that there are several causes of action alleged as a single cause of action and that two of these alleged causes of action are inconsistent with one other cause of action.

I think that matter should be disposed of by the court at the outset of the case. If it can not be disposed of, that an election on the part of the plaintiff be made and that there be an amendment of the pleadings. I have no objection to that, but I do think, as a matter of regularity, it should be determined just what the plaintiff is asking for, because it is a question whether or not he can ask for an inconsistent thing.

Mr. LANDES. Under the New York practice you can ask for inconsistent relief all the way through, but I will elect or proceed, if there is any inconsistency in my complaint in the bill of equity, to proceed on the one proposition, that the acts of the prohibition authorities in revoking the permit or refusing to renew it on the application filed was illegal and contrary to law. That is the only proposition I am interested in in this bill of equity.

Mr. GRANT. That is, you withdraw the prayer, not only for review of the refusal to issue the 1929 permit——

Mr. LANDES. That is right.

Mr. GRANT (continuing). And also a review of the refusal to issue a withdrawal permit?

211 Mr. LANDES. I withdraw those and just rest on the proposition that the prohibition authorities had no right to change

the terms and conditions of the permit by refusing to permit us to operate under our original basic permit. Is that all right?

Mr. GRANT. That is agreeable. The bill of complaint may be considered withdrawn as to anything else?

Mr. LANDES. All right.

Mr. GRANT. On this record here.

Mr. LANDES. I wish to offer in evidence permit No. 91, issued by the prohibition authorities, dated August 16, 1921.

Mr. GRANT. No objection.

(Marked "Plaintiff's Exhibit No 1.")

Mr. LANDES. Have you got the letter in which they refused our application?

Mr. GRANT. Yes.

Mr. LANDES. I offer in evidence copy of letter dated December 27, 1928, which Mr. Grant acquiesces in, as being a copy of the original which was sent to Long & Company, the plaintiff in this action.

Mr. GRANT. I waive the production of the original and the copy may stand as the original.

(Marked "Plaintiff's Exhibit No. 2.")

Mr. GRANT. If your honor please, I expect to offer this application if Colonel Landes does not wish to at this time.

Mr. LANDES. I just did not want to waive any rights; that is all I will offer, Mr. Grant, and I rest.

(Prima facie proofs closed.)

212 *Defendants' proofs*

Mr. GRANT. I offer in evidence an application for 1929 permit, filed by the plaintiff.

(Marked "Defendants' Exhibit A.")

Mr. LANDES. It contains a provision without prejudice to the original permit.

Mr. GRANT. There is nothing else that need be submitted because of the withdrawal of the prayer for relief and the amendment of the complaint with respect to a review for refusal; therefore, the record will not be presented to the court.

Mr. LANDES. Mr. Grant, the only proposition I had in mind in withdrawing that is this: In the event of an appeal on your part, I would have to file a new bill in equity. That would be all right. I will have to file a new bill in equity on the last proposition in view of the decision of this court on the identical proposition of law.

Mr. GRANT. You rest on the motion for temporary relief in which the court held that the acts of the commissioner in terminating the permit of the plaintiff was illegal and not in conformity with the decision of the Higgins case—Higgins v. Foster, in the Circuit Court of this district?

Mr. LANDES. Yes.

Mr. GRANT. I merely want to point out to the court one other thing that has not to date been presented to either the Circuit Court of

Appeals or the District Court, although I appreciate that your honor will be bound by the Higgins case, irrespective of this, but I do want the record to show that the matter was presented to the District Court. That is that section 6 of Title II of the Federal prohibition act, which provides as follows:

213 "Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent; it shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and the place where such acts may be performed."

It is the contention of the defense that the words, "designate and limit the time" provide that all permits must have a limited period in their provisions and that these indefinite periods are invalid under the authority of Higgins v. Mills and later decisions, which hold that the withdrawal of a purchase permit of alcohol, as governed by section 6, require that time limits be prescribed, and Section 6 must apply to those permits, and permits of indefinite duration would be invalid. That is one point which I intend to urge in this case.

Decision of the court

The COURT. I do not feel at liberty to pass upon that point, because if your contention is sound then the decision of the Circuit Court of Appeals in the Higgins case would be erroneous. I feel bound by that decision and I therefore grant the plaintiff's motion for a permanent injunction.

Mr. GRANT. As to the form of the decree, I ask that the decree be in the form of an injunction restraining the defendants from taking any action or refusing to take any action by reason of the regulation which provides that the plaintiff's permit has terminated.

214 The COURT. I think that is proper. You had in mind, not requiring an affirmative direction that they honor your withdrawal permits.

Mr. LANDES. That would not be in this decree, but this is to recognize our permit to be in full force and effect.

The COURT. My recollection is that I passed on that question.

You do not yet your liquor merely on this application.

Mr. LANDES. All we will have now is a permit, whether we can operate—every thirty days we will submit orders.

PLAINTIFF'S EXHIBIT NO. 1

This is the denaturing plant permit No. 91 which is annexed as Exhibit A to the bill of complaint and is printed at page 13 [189].

PLAINTIFF'S EXHIBIT NO. 2

This is a letter to the plaintiff from the Federal prohibition administrator dated December 27, 1928, which is annexed to the bill of complaint as Exhibit E and is printed at page 22 [198].

DEFENDANT'S EXHIBIT A

This is an application filed by the plaintiff with the Federal prohibition administrator for a 1929 denaturing plant permit and is annexed to the bill of complaint as Exhibit B and is printed at pages 14–19 [190–195].

215 In United States District Court

W. H. LONG & COMPANY, INC., PLAINTIFF

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, defendants

Final decree

Feb. 26, 1929

This cause duly came on to be heard before me on the 21st day of February, 1929, and was argued by counsel, and upon consideration thereof, it is

Ordered, adjudged, and decreed that the defendants, Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, their successors in office and their
216 agents and employees be, and they hereby are, enjoined and restrained from taking any action or refusing to take any action with respect to plaintiff's denaturing plant manufacturing permit by reason of that part of regulations No. 3 of the Treasury Department, Bureau of Prohibition, providing that denaturing plant permits of the kind held by plaintiff expired and terminated on December 31, 1928, and from refusing to honor plaintiffs' said permit with the same force and effect as though said part of regulations No. 3 had not been issued.

FRANK J. COLEMAN, *U. S. D. J.*

Notice of settlement is hereby waived.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for Defendant.

February 25, 1927.
LEWIS LANDES,
Solicitor for Plaintiff.

217 In United States District Court

[Title omitted.]

Notice of appeal

SIR: Please take notice that the defendants, Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from a decree signed by the Honorable Frank J. Coleman, one of the judges of this court, and entered herein on February 26, 1929, and that the defendants hereby appeal from each and every part of said decree as well as the whole thereof.

Dated New York, N. Y., April 2nd, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Solicitor for Defendants.

Office and P. O. address, U. S. Courts and P. O. Bldg., New York City, N. Y.

218 To LEWIS LANDES, Esq.,
Solicitor for Plaintiff.
Office and P. O. address, Woolworth Building, Borough of Manhattan, city of New York.

ALEXANDER GILCHRIST, Jr., Esq.,
Clerk of the District Court of the United States for the Southern District of New York.

Due service of a copy of the within is hereby admitted.
Copy received.
New York, April 2nd, 1929.

LEWIS LANDES,
Attorney for Plaintiff.

219 In United States District Court

[Title omitted.]

Petition for appeal and order allowing appeal

To the honorable Judges o fthe United States District Court for the Southern District of New York:

Comes now Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, by their solicitor,

Charles H. Tuttle, United States Attorney for the Southern District of New York, and feeling aggrieved by the final decree made and entered herein on February 26, 1929, by this court, complain that in the record and proceedings had in such cause manifest error has happened to the great damage of the petitioners as set forth in the assignments of error annexed hereto.

220 Wherefore the said defendants Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, do hereby appeal from said final decree of this court to the Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and that a transcript of the record of proceedings and papers upon which said decree is made, duly authenticated, be sent to the Circuit Court of appeals for the Second Circuit and that the same may be corrected.

Dated New York, N. Y., April 2nd, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York.

Appeal as prayed for is hereby allowed.

FRANK J. COLEMAN, *U. S. D. J.*

Dated New York, N. Y., April 2nd, 1929.

221 In United States District Court

[Title omitted.]

Assignment of errors

Comes now Maurice Campbell, Federal prohibition administrator for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, the appellants herein, and file the following assignments of error upon which they will rely upon their appeal from the final decree entered herein on February 26, 1929:

1. The court erred in making and entering the decree appealed from.

2. The court erred in holding that the provisions of article 95 of regulations No. 3 of the Bureau of Prohibition of the Treasury Department providing that permits of the kind held by plaintiff terminated on December 31, 1928, was an invalid regulation and that plaintiff's permit did not terminate on December 31, 1928.

222 3. The court erred in holding that the plaintiff was not estopped from contesting the validity of the said regulation providing that its permit terminated on December 31, 1928, and did not surrender its permit by filing an application for a 1929 renewal permit.

4. The court erred in holding that under the provisions of section 6 of Title II of the national prohibition act permits of the kind held by plaintiff can be issued to continue in force and effect for an indefinite period of time.

5. The court erred in holding that the Commissioner of Prohibition, by and with the approval of the Secretary of the Treasury of the United States, has no authority to amend the regulations issued under the provisions of the national prohibition act and the acts amendatory thereof and supplemental thereto, so as to provide that all permits of a certain class or classes issued without a specific expiration date shall terminate at a specific time unless renewed.

Wherefore appellants pray that the final decree of the said court may be reversed, and in order that the foregoing assignments of error may be made part of the record the appellants present the same to the court and pray that such disposition may be made thereof as is in accordance with the laws and statutes of the United States in such matters made and provided.

All of which is hereby submitted.

Dated, New York, N. Y., April 2nd, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitor for Appellants.

223 [Citation in usual form omitted in printing.]

224 In United States District Court

[Title omitted.]

Stipulation as to the record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the respective parties above named.

Dated, April 25, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Solicitor for Defendants-Appellants.

LEWIS LANDES,
Solicitor for Plaintiff-Appellee.

225 [Clerk's certificate to foregoing transcript omitted in printing.]

226 In United States Circuit Court of Appeals for the Second Circuit

W. H. LONG & CO., INC., APPELLANT

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE Second District of New York, et al., appellees

---

W. H. LONG & COMPANY, INC., APPELLEE

AGAINST

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATION FOR THE Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, appellants

Before MANTON L. HAND, and CHASE, Circuit Judges

Opinion

Appeal by the plaintiff in the first case from a final decree of the District Court for the Southern District of New York dismissing its bill.

Appeal by the defendants in the second case from a final decree of the District Court for the Southern District of New York enjoining them from interfering with the plaintiff's basic permit to manufacture denatured alcohol.

Lewis Landes for the plaintiff; U. S. Grant for the defendants.

Per curiam: The decree in this case is affirmed as to the defendants' appeal on the authority of Lion Laboratories Co. v. Campbell, handed down herewith; as to the plaintiff's appeal on the authority of Higgins v. Mills, 22 Fed. (2) 913 (C. C. A. 2).

227 In United States Circuit Court of Appeals, Second Circuit

W. H. LONG & CO., INC., PLAINTIFF-APPELLEE

v.

MAURICA CAMPBELL, AS ADMNR., ETC., ET AL., DEFENDANTS-APPELLANTS

Decree

Filed July 15, 1929

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

228 [File indorsement omitted.]

229 [Clerk's certificate to foregoing transcript omitted in printing.]

230 Supreme Court of the United States

No. 443, October term, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., et al., petitioners

vs.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., et al.

Order allowing certiorari

Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

231 Supreme Court of the United States

No. 444, October term, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., et al., petitioners

vs.

D. P. PAUL AND COMPANY, INCORPORATED

Order allowing certiorari

Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

282 Supreme Court of the United States

No. 445, October term, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ETC., et al., petitioners

vs.

W. H. LONG & COMPANY, INCORPORATED

Order allowing certiorari

Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

File Nos. 34574, 34575, 34576. U. S. Circuit Court of Appeals, Second Circuit. Term No. 443. Maurice Campbell, Federal prohibition administrator, etc., James M. Doran, Commissioner of Prohibition of the United States, et al., petitioners, vs. Galeno Chemical Company, Inc., Union Course Pharmacy Inc., P. T. Chemical Company, et al., etc. Term No. 444. Maurice Campbell, Federal prohibition administrator, etc., James M. Doran, Commissioner of Prohibition of the United States, et al., petitioners, vs. D. P. Paul and Company, Incorporated. Term No. 445. Maurice Campbell, Federal prohibition administrator, etc., and James M. Doran, Federal Prohibition Commissioner of the United States, petitioners, vs. W. H. Long & Company, Incorporated. Petition for writs of certiorari and exhibits thereto. Filed October 15, 1929. File Nos. 34574, 34575, 34576.

○

FILE COPY

Nos. 443-4-5

In the Supreme Court of the United States

OCTOBER TERM, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SOUTHERN JUDICIAL DISTRICT OF NEW YORK, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., AND ARTHUR S. KATZENBOGEN, DOING BUSINESS UNDER THE STYLE AND TRADE NAME OF THE CURATONE COMPANY

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

D. P. PAUL AND COMPANY, INC.

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK, AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS

v.

W. H. LONG & COMPANY, INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Southern Judicial District of New York, JAMES M. DORAN, Commissioner of Prohibition of the United States, and ANDREW W. MELLON, Secretary of the Treasury of the United States, petitioners

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., and ARTHUR S. KATZENBOGEN, doing business under the style and trade name of THE CURATONE COMPANY

No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Second District, JAMES M. DORAN, Commissioner of Prohibition of the United States, and ANDREW W. MELLON, Secretary of the Treasury of the United States, petitioners

v.

D. P. PAUL AND COMPANY, INC.

No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Second District of New York, and JAMES M. DORAN, Federal Prohibition Commissioner of the United States, petitioners

v.

W. H. LONG & COMPANY, INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioners above named, prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cases on July 15, 1929, affirming the decisions of the District Court for the Southern District of New York.

QUESTIONS PRESENTED

These cases present the following questions:

(1) Are denatured alcohol and medicinal preparations containing more than one-half of one per cent of alcohol by volume (described in Section 4, Title II, of the National Prohibition Act), at the time of manufacture and before being prepared for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

(2) Does the provision of Section 6, Title II, of said Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, require that every permit have a definite time limitation; or is that requirement satisfied by a provision in the

permit that it shall remain in force until "revoked, suspended, or renewed as provided by law or regulations," or by a provision that it shall remain in operation until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto"?

(3) May a permit, issued under the provisions of Section 4, Title II, for the use of liquor in manufacturing denatured alcohol or medicinal preparations, and which contains no definite time limitation, be terminated by a general regulation providing that all such permits shall terminate on a date named?

STATUTE AND REGULATIONS INVOLVED

The National Prohibition Act, Title II, c. 85, 41 Stat. 305, 307–311:

> SEC. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 percentum or more of alcohol by volume which are fit for use for beverage purposes: * * *.
>
> * * * * * *
>
> (7) The term "regulation" shall mean any regulation prescribed by the commissioner

with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

* * * * * *

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

* * * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such

articles and to purchase such liquor * * *. (U. S. C., Title 27, Sec. 13.)

* * * * *

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of

his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

* * * * *

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the

descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C., Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

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Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

SEC. 218. *All permits to be renewed annually.*—All permits issued and in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed in the manner hereinafter specified; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year, and if issued after August 31 of any calendar year shall expire on December 31 of the succeeding calendar year, and may be renewed only in the manner hereinafter specified.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * *

Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31, of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

STATEMENT

Galeno Chemical Company, Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., Arthur S. Katzenbogen (doing business as The Curatone Company), and D. P. Paul and Company,

Inc., held permits which authorized the use of liquor in the manufacture of certain medicinal preparations. These permits were issued November 20, 1926, March 11, 1925, November 20, 1926, May 19, 1925, and January 22, 1925, respectively. (Galeno Chem. Co. R. 4–5; 28–39; Paul Co. R. 5, 20.) W. H. Long & Company, Inc., held a permit issued August 16, 1923, authorizing the operation of a denaturing plant and the purchase and receipt of alcohol thereat. (Long Co. R. 4, 13.)

Each permit, except that issued to Long & Company, specified that it would continue in force until "revoked, suspended, or renewed as provided by law or regulations." (Galeno Chem. Co. R. 29, 34, 36, 38; Paul Co. R. 21.) The Long & Company permit provided that it would remain in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto." (Long Co. R. 13.) All except the Long & Company permit contained the provision that "this permit confers only a personal privilege and confers no vested rights." (Galeno Chem. Co. R. 29, 34, 36, 39; Paul Co. R. 22.)

On October 1, 1927, Regulations 2 and 3, Treasury Department, Bureau of Prohibition, became effective. Regulations 2 govern the use of liquor in the manufacture of medicinal preparations (Secs. 216, et seq., Regulations 2) and Regulations 3 the use of alcohol in the manufacture of denatured alcohol (Arts. 88–95, Regulations 3). Section 218 of Reg-

ulations 2 and Article 95 of Regulations 3 each provide that all permits in effect on October 1, 1927, shall expire on December 31, 1928, unless renewed, that all permits thereafter issued prior to September 1 of any calendar year shall expire on December 31 of the same year, and that those issued after August 31 shall expire on December 31 of the succeeding year.

In accordance with Regulations 2 and 3, applications for renewal of the permits were filed in each of the cases involved. (Galeno Chem. Co. R. 6–7; Paul Co. R. 9; Long Co. R. 5.) The application of Long & Company was disapproved. (Long Co. R. 20.) A date for hearing on each application involved in the Galeno Chemical Company case and the Paul Company case was set by the local Prohibition Administrator and the permittees were given notice to produce evidence why their permits should be renewed and why alcohol or other spirits, instead of whisky, should not be used in the manufacture of their products. (Galeno Chem. Co. R. 6, 41–46; Paul Co. R. 10, 24.)

Suits in equity were thereupon filed in the District Court for the Southern District of New York in which the permittees asked for temporary and permanent injunctions restraining the administrative officers from proceeding with the aforesaid hearings and from otherwise interfering with their permits. In the Galeno Chemical Company case and the Paul Company case it was asserted that Section 218 of Regulations 2, in so far as

it purported to "cancel, terminate, suspend or revoke" the several permits involved, was void. (Galeno Chem. Co. R. 8; Paul Co. R. 13.) In the Long Company case it was contended that the permit in question could be terminated only as provided in Section 9, Title II, of the National Prohibition Act, thereby raising the validity of Article 95 of Regulations 3. (Long Co. R. 8, 34–37.)

The District Court, in the Galeno Chemical Company case and the Paul Company case, granted temporary injunctions restraining the defendants from interfering with plaintiffs' permits (Galeno Chem. Co. R. 56; Paul Co. R. 66), and in the Long Company case granted a permanent injunction (Long Co. R. 37, 39). The several cases were appealed to the Circuit Court of Appeals. (Galeno Chem. Co. R. 63–77; Paul Co. R. 68–77; Long Co. R. 41–47.) That court, rendering its principal opinion in the Galeno Chemical Company case (R. 83), affirmed the decrees below. (Galeno Chem. Co. R. 86; Paul Co. R. 81; Long Co. R. 50.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

(1) In affirming the decrees of the District Court.

(2) In holding that permits authorizing the manufacture of denatured alcohol and medicinal preparations, described in Section 4, Title II, of the National Prohibition Act, are not permits for the manufacture of "liquor" within the meaning of Sections 1 and 6, Title II, of said Act.

(3) In holding that the provision of Section 6, Title II, that every permit shall "designate and limit * * * the time when" the authorized acts may be performed, does not require that a permit contain a definite and certain time limitation, but was satisfied by the above-quoted provisions in the permits here involved.

(4) In holding that Section 9, Title II, of the Act constitutes a limitation upon the power of the Secretary of the Treasury and the Federal Prohibition Commissioner to issue the regulations in question.

REASONS FOR GRANTING THE WRITS

(1) There is a direct conflict between the decision of the Circuit Court of Appeals for the Second Circuit herein and the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362.

(2) The question whether the Federal Prohibition Commissioner may by general regulation terminate permits of the class here involved is one which is constantly arising. According to information supplied by the Commissioner under date of August 13, 1929, there were at that time outstanding within the jurisdiction of the Second and Third Circuits alone 7,755 permits without definite time limitations. There are now pendng in the Circuit Court of Appeals for the Third Circuit over thirty cases presenting the question here involved.

(3) The question of the power and authority of the Commissioner to promulgate such regulations is one of great importance not only to the Government in the administration of the permit system under the National Prohibition Act, but also to the large number of persons holding permits for the use of liquor in trade and industry.

Wherefore, it is respectfully submitted that this petition for writs of certiorari to review the decrees of the Circuit Court of Appeals for the Second Circuit in the above cases should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

OCTOBER, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (Galeno Chem. Co. R. 83) has not yet been reported.

JURISDICTION

The several decrees of the Circuit Court of Appeals were entered July 15, 1929. (Galeno Chem. Co. R. 86; Paul Co. R. 81; Long Co. R. 50.) The jurisdiction of this Court to issue the writs is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the case, the questions presented, and the statutes and regulations involved will be found in the petition.

ARGUMENT

I

AT THE TIME OF MANUFACTURE AND BEFORE BEING PREPARED FOR THE MARKET, DENATURED ALCOHOL AND MEDICINAL PREPARATIONS CONTAINING MORE THAN ONE-HALF OF ONE PER CENT OF ALCOHOL BY VOLUME ARE "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE ACT. PERMITS TO MANUFACTURE "LIQUOR" MAY BE ISSUED FOR ONE YEAR ONLY

Section 1, Title II, of the National Prohibition Act includes as "liquor," "alcohol, brandy, whisky,

* * * and in addition thereto any spirituous * * * liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are *fit for use for beverage purposes.*" (Italics ours.)

It is submitted that, in defining "liquor," Congress included not only those alcoholic compounds which are fit for immediate use as a beverage, but all compounds containing more than one-half of one per cent of alcohol which are "fit for use for *beverage purposes.*" See *Cywan* v. *Blair* (N. D. Ill.), 16 F. (2d) 279, 283, where it was held that Section 1 includes "liquids usable for beverage purposes, either mediately or immediately." Pure alcohol, for instance, is not fit for use as a beverage. It is, however, fit "for use" for "beverage purposes." By adding water to alcohol one produces a mixture which is fit for use as a beverage. *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362, 363. Specially denatured alcohol is not fit for use as a beverage, but it is common knowledge that it is used "for beverage purposes." By extracting the denaturants from specially denatured alcohol and adding water one has a potable mixture. Neither alcohol nor specially denatured alcohol is fit for use as a beverage in its original state. Both substances may, however, be used for beverage purposes when treated. The same may be said

of many medicinal preparations and patented medicines.

That Congress intended that the definition of "liquor" as set forth in Section 1 of Title II should include the articles here involved, together with the other articles mentioned in Section 4 of Title II, is indicated by the fact that Congress found it necessary to exclude them from the operation of the Act. It provided in Section 4 that said articles "shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act." If Congress had not considered these articles as included within Section 1 of the Act, this provision of Section 4 would have been unnecessary. See *Brown* v. *Maryland*, 12 Wheat. 419, 438.

These articles are treated as intoxicating liquor and, under the provisions of Section 4, remain within the operation of the Act until two things have occurred: (1) the articles must have "been manufactured;" *and* (2) they must have been "prepared for the market." The articles are not excluded from the provisions of the Act at the time of manufacture. They remain within the Act until "prepared for the market." A proviso to a general Act will be strictly construed and will take no case out of the general provisions of the Act which does not fall fairly within its terms. See *United States* v. *Dickson*, 15 Pet. 141, 165. This was the intent of Congress. Section 5 of Title II provides that if a Section 4 article be not manufactured

strictly according to authorized formula, it shall be treated as an intoxicating liquor. A permit to manufacture one of these articles is therefore a permit to manufacture "liquor." See *Chicago Grain Products Co.* v. *Mellon, supra,* p. 363; *Cywan* v. *Blair, supra,* pp. 283–284.

Section 6 of Title II provides that "All permits to manufacture * * * liquor, may be issued for one year, * * *." Regulations 2 and 3 here involved therefore did no more than state the law of the National Prohibition Act, and hence respondents' permits were never valid, in any event, for a longer time than that for which they might have been issued under Section 6.

II

SECTION 6 OF TITLE II REQUIRES THAT ALL PERMITS HAVE A DEFINITE TIME LIMITATION. THE PERMITS HERE INVOLVED DID NOT CONTAIN A SUFFICIENT TIME LIMITATION UNDER THAT SECTION

Even if it be held, however, that the denatured alcohol and medicinal preparations here involved were not "liquor" within the meaning of the first sentence of Section 6, it is submitted that the failure of the permits here in question to provide any definite time limitation rendered them invalid under a general provision of Section 6, which the court below assumed (Galeno Chem. Co. R. 84) applied to permits other than for the manufacture of liquor (*cf. Driscoll* v. *Campbell* (C. C. A. 2d), 33 F. (2d) 281) and which reads as follows:

> Every permit shall be in writing, dated when issued, and signed by the commissioner

> or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate and limit the acts that are permitted and the time when and place where such acts may be performed.* (Italics ours.)

This statute directs that every permit shall *designate* and *limit* three things: (1) the acts that are permitted; (2) the time when, and (3) the place where, such acts may be peformed. Effect must be given to every word of the statute.

We submit that it is plain that when Congress directed that every permit should designate the acts to be permitted and the place where they were to be performed it had in mind a definite and specific designation, and not one which would leave open to speculation and conjecture what acts or place were contemplated by the permit. In no other way could proper control be exercised over permittees. Likewise, and for a similar reason, Congress must have intended that the designation as to "time" should be definite. Not only must the time be *designated*, but the life of the permit must be *limited* to the designated time. The words "designate" and "limit" must be given the same meaning in respect to the "time" as they have with respect to the "acts" and "place." See *Lewellyn v. Harbison* (C. C. A. 3d), 31 F. (2d) 740, 742. Moreover, the limitation must be in the permit itself. Obviously, if an indefinite designation and an indefinite limitation as to the "acts" and

"place" will not satisfy the statute, as we contend, then an indefinite designation and an indefinite limitation as to the "time" are insufficient.

Congress was fully aware of the difficulties always attendant upon efforts to suppress the liquor traffic. *Donnelley* v. *United States*, 276 U. S. 505, 512–513. A regulatory or permit system was not new. *United States* v. *Katz*, 271 U. S. 354, 358–359. It must have known that permits authorizing indefinite "acts" at an indefinite "place" issued for an indefinite "time" would render impossible of effective enforcement the permit system set up by the Act and defeat its purpose. We submit that when Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation.

The permits here involved recited that they should remain in force until "revoked, suspended, or renewed as provided by law or regulations," or until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto."[1]

We submit that this is no sufficient limitation of time within the requirement of Section 6. Of course, a permit would terminate upon "surrender," whether it contained a provision to that effect or not. There is no provision of law for the "suspension" of a permit, and hence the insertion of

[1] For a history of the regulations and decisions affecting the life of permits, see Appendix.

the word "suspended" was surplusage. In any event, a suspension of a permit would not terminate its life. A permit could not be "renewed" unless it had expired. The futility of limiting the life of a permit to the time of its beginning anew is obvious.

As to "revocation," Sections 5 and 9 of Title II direct that where a permittee is not manufacturing a Section 4 article according to authorized formula, or where he is not in good faith conforming to the National Prohibition Act or has violated a State law relating to intoxicating liquor, the Commissioner shall revoke his permit. These provisions are undoubtedly mandatory. See *Donnelley* v. *United States*, 276 U. S. 505. If a permit is revoked pursuant to the provisions of Section 5 or Section 9 it, of course, no longer continues in force. Obviously, a permit would terminate upon revocation even though it did not so provide. Congress in inserting a requirement that every permit shall designate and limit the time within which the acts authorized shall be performed must have had in mind the accomplishment of a purpose other than those to which Sections 5 and 9 relate. We submit that this purpose was the advantage to be afforded by a definite restriction upon the life of permits. With permits terminating upon definite dates the permittee would be required periodically to apply for renewal of his permit and would have the burden of establishing his right to a new, or the renewal of an old, permit. (Sec. 6; *Chicago Grain Products Co.* v. *Mellon, supra*, p. 364; *Yudelson* v.

Andrews (C. C. A. 3d), 25 F. (2d) 80, 82–83.) But such purpose is not accomplished by construing Section 6 as authorizing permits, which, as held by the court below (Galeno Chem. Co. R. 85), reserved to the administrative officers no right to terminate except by revocation proceedings particularly prescribed by the Act. Before the Commissioner may revoke an outstanding permit under Section 5 or Section 9 he must hold a hearing and establish one of the grounds of revocation therein specified. We submit that if Congress had intended that permittees might be subject to no more effective control than would be secured through the proceedings for revocation authorized by those sections, it would have been unnecessary to require the limitation of time provided in Section 6.

III

SECTION 9 OF TITLE II IS NOT A LIMITATION UPON THE QUASI-LEGISLATIVE POWERS DELEGATED TO THE ADMINISTRATIVE OFFICERS TO ESTABLISH GENERAL REGULATIONS

If, as held by the court below, Congress did not intend by Section 6 to provide for the termination of Section 4 permits on a definite date, then we submit that the Act delegated to the Commissioner the power to fix the life of such permits by regulation, and that Regulations 2 and 3 were promulgated in pursuance of such power. Section 9 of Title II authorizes the revocation of an *indi-*

vidual permit for cause, and provides against arbitrary or capricious action by requiring a hearing and the production of evidence. In *Chicago Grain Products Co.* v. *Mellon, supra,* it was said (p. 363):

> The provisions of section 9, title 2, are limited to inquiries to determine whether *a permit shall be canceled for the reasons therein specified.* (Italics ours.)

It is, we submit, no limitation upon and in no way relates to the quasi-legislative power to establish *general* regulations.

Congress has the power by legislation to cancel permit rights. *Everard's Breweries* v. *Day,* 265 U. S. 545, 563. It has the right to delegate this power. See *Liscio v. Campbell* (C. C. A. 2d), opinion rendered July 2, 1929, but not yet reported.

The power to promulgate regulations is not one to be once used and forever lost. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 638; *Lacquer & Chemical Corporation* v. *Mills,* 22 F. (2d) 697, 699; affirmed 22 F. (2d) 700; certiorari denied, 276 U. S. 617; *Cywan* v. *Blair,* 16 F. (2d) 279, 282; *Millstone* v. *Yellowley,* 290 Fed. 855, 857. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public, *Mugler* v. *Kansas,* 123 U. S. 623; and neither could they by a regulation providing for a permit of indefinite duration confer a vested right

which would prevent them from promulgating a subsequent regulation terminating the permit on a day certain, with provision for its renewal, so that they might have more effective supervision over permittees. As was said in *Cywan* v. *Blair, supra* (p. 282), with respect to Treasury Decision No. 3773, containing provisions similar to Regulations 2 and 3 here involved:

> Perpetuities are not generally favored. The whole field of permit privileges, under not only the Prohibition Act, but all other acts, shows that the common practice is to limit permits for a definite period, renewable at the termination of each period. It is not clear and beyond doubt, as the complainant contends, that the Treasury Decision here involved is not a reasonable regulation.

CONCLUSION

For the above reasons we submit that, especially in view of the provision of Section 3 that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," the decision of the court below holding invalid Regulations 2 and 3, so far as they affected the permits here involved, was erroneous. As the cases present a conflict of decisions and involve questions of importance in the administration of the permit system under the National Prohibition Act which are constantly arising, they are proper ones for review by this Court. The peti-

tion for the several writs of certiorari should therefore be granted.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

JOHN H. MCEVERS,
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Chief Attorney.

OCTOBER, 1929.

APPENDIX

HISTORY OF PERTINENT REGULATIONS

On January 16, 1920, Regulations 60 were promulgated. Regulations 60 governed the manufacture of all the articles enumerated in Section 4 of Title II, except denatured alcohol. Section 18 of these Regulations provided that all manufacturing permits issued thereunder prior to August 31st of any year would expire on December 31st of such year, and that all such permits issued from September 1st to December 31st of any year would expire on December 31st of the following year, unless otherwise provided. On January 31, 1920, Regulations 61 were promulgated. These regulations governed the manufacture of denatured alcohol. Article 97 thereof provided that permits to manufacture denatured alcohol would remain in force until voluntarily surrendered or revoked by the Commissioner. On March 14, 1924, Regulations 60 were revised so as to provide that manufacturing permits issued under Section 4 of Title II should continue in force until canceled, suspended, revoked or voluntarily surrendered by the permittee. (Section 260, pp. 17–18, Regulations 60, as revised.) On November 14, 1925, Treasury Decision 3773 was promulgated. This Decision provided that all manufacturing permits, including permits to manufacture denatured alcohol, issued prior to August 31st of any calendar year, should expire on December 31st of the same year, and that all manu-

facturing permits issued after August 31st of any calendar year should expire on December 31st of the succeeding year.

On June 1, 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *Higgins* v. *Foster*, 12 F. (2d) 646, held that Treasury Decision 3773 was void in so far as it attempted to cancel a permit of indefinite duration, issued under Regulations 61, authorizing the manufacture of denatured alcohol.

On September 1, 1926, Treasury Decision 3925, so far as here pertinent, rescinded Treasury Decision 3773. On November 9, 1926, the Circuit Court of Appeals for the Seventh Circuit, in the case of *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, held that Treasury Decision 3773 was valid. On September 2, 1927, Regulations 2, being a revision of Regulations 60, were promulgated. On August 23, 1927, Regulations 3, being a revision of Regulations 61, were promulgated. Both were effective October 1, 1927. Regulations 2 and 3 substantially reenacted the provisions of Treasury Decision 3773 and purported to terminate all outstanding unlimited manufacturing permits as of the 31st day of December, 1928. (Section 218 of Regulations 2; Article 95 of Regulations 3.)

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILE COPY

Nos. 443, 444, and 445

In the Supreme Court of the United States

OCTOBER TERM, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SOUTHERN JUDICIAL DISTRICT OF NEW YORK, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., AND ARTHUR S. KATZENBOGEN, DOING BUSINESS UNDER THE STYLE AND TRADE NAME OF THE URATONE COMPANY

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

D. P. PAUL AND COMPANY, INC.

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK, AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS

v.

W. H. LONG & COMPANY, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 33) is reported in 34 F. (2d) 642.

JURISDICTION

The several decrees of the Circuit Court of Appeals were entered on July 15, 1929. (R. 36–37, 73–74, 97–98.) Petition for certiorari was filed October 15, 1929. Writs of certiorari were granted December 2, 1929. (R. 98–99.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Are denatured alcohol and medicinal preparations containing more than one half of one per cent of alcohol by volume (described in Section 4, Title II, of the National Prohibition Act), at the time of manufacture and before being prepared for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" "shall expire on the 31st day of December next succeeding the issuance thereof"?

(2) Does the provision of Section 6, Title II, of said Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, require that every permit have a definite time limitation; or is that requirement satisfied by a provision in the permit that it shall remain in force until "revoked, suspended, or renewed as provided by law or regulations," or by a provision that it shall remain in

operation until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto"?

(3) May a permit, issued under the provisions of Section 4, Title II, for the use of liquor in manufacturing denatured alcohol or medicinal preparations, and which contains no definite time limitation, be terminated by a general regulation providing that all such permits shall terminate on a date named?

STATUTE AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set forth in the appendix hereto (pp. 25–31).

STATEMENT

Galeno Chemical Company, Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., Arthur S. Katzenbogen (doing business as The Curatone Company), the respondents in No. 443 (hereafter referred to as the *Galeno Chemical Company Case*) and D. P. Paul and Company, Inc., the respondent in No. 444, held permits which authorized the use of liquor in the manufacture of certain medicinal preparations. These permits were issued November 20, 1926, March 11, 1925, November 20, 1926, May 19, 1925, and January 22, 1925, respectively. (R. 2, 16, 14, 15, 11, 39, and 47.) W. H. Long & Company, Inc., the respondent in No. 445, held a permit issued August 16, 1923, authoriz-

ing the operation of a denaturing plant and the purchase and receipt of alcohol thereat. (R. 76, 80.)

Each permit, except that issued to Long & Company, specified that it would continue in force until "revoked, suspended, or renewed as provided by law or regulations." (R. 12, 14, 15-16, 17, 48.) The Long & Company permit provided that it would remain in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto." (R. 80-81.) All the permits were issued in accordance with the regulations in force at the time of issuance. That to W. H. Long & Company was issued in accordance with the provisions of Article 97 of Regulations 61. The Union Course Pharmacy, Arthur S. Katzenbogen, and D. P. Paul and Company permits were issued in accordance with Section 260 of Regulations 60, as revised March 14, 1924. The Galeno Chemical Company and P. T. Chemical Company permits were issued under Treasury Decision 3925, promulgated September 1, 1926. (For history of Regulations and Treasury Decision, see Appendix, pp. 31-33.) All except the Long & Company permit contained the provision that "this permit confers only a personal privilege and confers no vested rights." (R. 12, 15, 16, 17, 48.)

On October 1, 1927, Regulations 2 and 3, Treasury Department, Bureau of Prohibition, became effective. Regulations 2 govern the use of liquor

in the manufacture of medicinal preparations (Secs. 216, et seq., Regulations 2) and Regulations 3 the use of alcohol in the manufacture of denatured alcohol. (Arts. 88–95, Regulations 3.) Section 218 of Regulations 2 and Article 95 of Regulations 3 each provide that all permits in effect on October 1, 1927, shall expire on December 31, 1928, unless renewed; that all permits thereafter issued prior to September 1 of any calendar year shall expire on December 31 of the same year; and that those issued after August 31 shall expire on December 31 of the succeeding year.

In accordance with Regulations 2 and 3, applications for renewal of the permits were filed in each of the cases involved. (R. 3–4, 41–42, 77.) The application of Long & Company was disapproved. (R. 84.) A date for hearing on each application involved in the *Galeno Chemical Company case* and the *Paul Company case* was set by the local Prohibition Administrator, and the permittees were given notice to produce evidence why their permits should be renewed and why alcohol or other spirits, instead of whiskey, should not be used in the manufacture of their products. (R. 4, 18–20, 42, 49.)

Suits in equity were thereupon filed in the District Court for the Southern District of New York in which the permittees asked for temporary and permanent injunctions restraining the administrative officers from proceeding with the aforesaid hearings and from otherwise interfering with their

permits. In the *Galeno Chemical Company case* and the *Paul Company case* it was asserted that Section 218 of Regulations 2, in so far as it purported to "cancel, terminate, suspend, or revoke" the several permits involved, was void. (R. 4, 43–44.) In the *Long Company case* it was contended that the permit in question could be terminated only as provided in Section 9, Title II, of the National Prohibition Act, thereby raising the validity of Article 95 of Regulations 3. (R. 78, 90–92.)

The District Court, in the *Galeno Chemical Company case* and the *Paul Company case*, granted temporary injunctions restraining the defendants from interfering with plaintiffs' permits (R. 24–25, 68–69) and in the *Long Company case* granted a permanent injunction. (R. 93.) The several cases were appealed to the Circuit Court of Appeals. (R. 27–28, 70–71, 94–95.) That court, rendering its principal opinion in the *Galeno Chemical Company case* (R. 33), affirmed the decrees below. (R. 36–37, 73–74, 97–98.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

(1) In affirming the decrees of the District Court.

(2) In holding that permits authorizing the manufacture of denatured alcohol and medicinal preparations, described in Section 4, Title II, of the National Prohibition Act are not permits for

the manufacture of "liquor" within the meaning of Sections 1 and 6, Title II, of said Act.

(3) In holding that the provision of Section 6, Title II, that every permit shall "designate and limit * * * the time when" the authorized acts may be performed, does not require that a permit contain a definite and certain time limitation, but was satisfied by the above-quoted provisions in the permits here involved.

(4) In holding that Section 9, Title II, of the Act constitutes a limitation upon the power of the Secretary of the Treasury and the Commissioner of Prohibition to issue the regulations in question.

SUMMARY OF ARGUMENT

Congress intended that all permits should be issued for a limited time. Permits to manufacture "liquor" may be issued for not more than one year. All permits required by statute must designate an expiration date. If, however, Congress did not make provision for the expiration of Section 4, Title II, permits, it left the matter to the control of regulations to be issued from time to time.

A more detailed summary of these propositions may be stated as follows:

1. Permits to manufacture "liquor" may be issued for one year, but they expire by operation of law "on the 31st day of December next succeeding the issuance thereof." (Section 6, Title II, of the National Prohibition Act.) At the time of being manufactured and before being prepared for the

market denatured alcohol and medicinal preparations containing more than one-half of 1 per cent of alcohol by volume are "liquor" within the meaning of Section 6. Permits to manufacture denatured alcohol and medicinal preparations are therefore permits to manufacture "liquor," and expire by operation of law "on the 31st day of December next succeeding the issuance thereof."

2. If permits to manufacture denatured alcohol and medicinal preparations be not permits to manufacture "liquor," nevertheless every permit which the Commissioner is authorized to issue must "designate and limit the acts that are permitted and the time when and place where such acts may be performed." Section 6, Title II. When Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation. Accordingly, a permit having an indefinite time limitation was unauthorized. Regulations 2 and 3 brought the practice into accord with the statute and are therefore valid. See *Higgins* v. *Mills* (C. C. A. 2d), 22 F. (2d) 913, 914.

3. If Congress did not provide for the termination of Section 4 permits on definite dates, it left the matter open to control by regulations to be issued from time to time. The exercise of a delegated power is not to be once used and forever lost. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public in such manner as to preclude the future exercise of the powers dele-

gated. Section 9, Title II, of the National Prohibition Act has reference to functions judicial in their nature conferred on the administrative officers; to inquiries as to whether an individual permit should be revoked. It in no way relates to the delegated quasi-legislative power to establish regulations.

ARGUMENT

I

AT THE TIME OF MANUFACTURE AND BEFORE BEING PREPARED FOR THE MARKET, DENATURED ALCOHOL AND MEDICINAL PREPARATIONS CONTAINING MORE THAN ONE-HALF OF ONE PER CENT OF ALCOHOL BY VOLUME ARE "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE ACT. PERMITS TO MANUFACTURE "LIQUOR" MAY BE ISSUED FOR ONE YEAR ONLY

W. H. Long & Company held a permit to manufacture denatured alcohol. (R. 80–81.) A similar permit was involved in the case of *Higgins* v. *Foster,* 12 F. (2d) 646, where the Circuit Court of Appeals for the Second Circuit held that denatured alcohol is not "liquor" within the meaning of Section 6, Title II, of the National Prohibition Act, which provides that all permits to manufacture "liquor" "may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof." That decision was followed in the case of Galeno Chemical Company (R. 34) involving permits to use whiskey in the manufacture of medicinal preparations. (R. 11–16.) The W. H. Long & Company (R. 97) and the D. P. Paul

Company (R. 73) cases were decided upon authority of the decision in the *Galeno Chemical Company case.* The question which will be first considered is whether permits to use alcohol in the manufacture of denatured alcohol, and to use liquor in the manufacture of medicinal preparations, are permits to manufacture "liquor" within the meaning of Section 6.

Section 1 includes as "liquor" not only those alcoholic compounds which are fit for immediate use *as a beverage,* but all compounds containing more than one-half of one per cent of alcohol which are "fit for use for beverage purposes." See *Cywan* v. *Blair* (N. D. Ill.), 16 F. (2d) 279, 283, where it was held that Section 1 includes liquids usable *for beverage purposes,* either mediately or immediately. Pure alcohol, for instance, is not fit for use *as a beverage.* It is, however, "fit for use *for beverage purposes.*" By adding water to alcohol one produces a mixture which is fit for use *as a beverage. Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362, 363. Specially denatured alcohol may not be fit "for use as an intoxicating beverage," but it is common knowledge that it is used "for beverage purposes." By extracting the denaturant from specially denatured alcohol and adding water one has a potable mixture. Neither alcohol nor specially denatured alcohol is fit for use *as a beverage* in its original state. Both substances may, however, be used *for beverage purposes* when treated.

That Congress intended that the definition of "liquor" contained in Section 1, Title II, should include all articles mentioned in Section 4 is indicated by the fact that Congress found it necessary to exclude them under certain conditions from the operation of the Act. It is provided in Section 4 that said articles "shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act." The implication is that these articles would be within the statute, and hence "liquor," were they not expressly excepted. See *United States* v. *Woodward,* 256 U. S. 632, 634. If Congress had not considered these articles as included in Section 1, this provision of Section 4 would have been unnecessary. See *Brown* v. *Maryland,* 12 Wheat. 419, 438.

These articles are treated as intoxicating liquor and, under the provisions of Section 4, remain within the operation of the Act until two things have occurred: (1) the articles must have "been manufactured"; *and* (2) they must have been "prepared for the market." The articles are not excluded from the provisions of the Act at the time of manufacture. They remain within the Act until "prepared for the market." A proviso to a general Act will be strictly construed and will take no case out of the general provisions of the Act which does not fall fairly within its terms. See *United States* v. *Dickson,* 15 Pet. 141, 165. This was the intent of

Congress. Section 5 of Title II provides that if a Section 4 article be not manufactured strictly according to authorized formula it shall be treated as "liquor." It is submitted that a permit to manufacture one of these articles is a permit to manufacture "liquor". See *Chicago Grain Products Co.* v. *Millon, supra,* p. 363; *Cywan* v. *Blair, supra,* pp. 283–284.

The administrative practice with respect to this matter has not been uniform nor wholly consistent, as is shown by the history of the regulations and Treasury decisions printed in the appendix. (*Infra,* pp. 31–33.) From 1920 to 1924 the regulations treated denatured alcohol differently from the other articles enumerated in Section 4, Title II, permits to manufacture the former not having been made subject to the time limitation applying to such other articles. Thereafter, denatured alcohol and the other articles enumerated in Section 4 were treated upon the same basis, but the regulations dealing with the time limitation were varied, the variations apparently being caused by the Department's understanding of certain court decisions. But that the construction above contended for is in accordance with the administrative interpretation of the word "liquor" is indicated by certain of the general regulations. Section 103 of Regulations 60, as revised March, 1924, and Section 10 (1) of Regulations 2, effective October 1, 1927, define Section 4 articles:

SEC. 103. The articles enumerated in section 4, Title II, national prohibition act, after having been manufactured and prepared for the market shall not be construed to be included within the word "liquor" or phrase "intoxicating liquor," as used herein, if such articles correspond with the description and limitations named in said section 4.

SEC. 10 (l). *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Cearly these definitions of "liquor" contemplate that Section 4 articles shal be treated as "liquor" until "prepared for the market."

Section 6 of Title II provides that "all permits to manufacture * * * liquor *may* be issued for one year, and *shall* expire on the 31st day of December next succeeding the issuance thereof." (Italics supplied.) Regulations 2 and 3 here involved therefore did no more than state the law of the National Prohibition Act, and hence respondents' permits were never valid, in any event, for a longer time than that for which they might have been issued under Section 6.

II

SECTION 6 OF TITLE II REQUIRES THAT ALL PERMITS HAVE A DEFINITE TIME LIMITATION. THE PERMITS HERE INVOLVED DO NOT CONTAIN A SUFFICIENT TIME LIMITATION UNDER THAT SECTION.

Even if it were held that the denatured alcohol and medicinal preparations here involved were not, at the time of manufacture, "liquor" within the meaning of the second paragraph of Section 6, it is submitted that the failure of the permits here in question to provide any definite time limitation rendered them invalid under a general provision of Section 6, which reads as follows:

> Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate and limit the acts that are permitted and the time when and place where such acts may be performed.* (Italics ours.)

In the case of *Higgins* v. *Foster, supra,* the Circuit Court of Appeals for the Second Circuit held that Section 6 had no application to a permit to manufacture denatured alcohol. The third paragraph of Section 6 authorizes a court of equity to review the Commissioner's refusal to grant a permit. There is no other statute conferring such jurisdiction. In *Driscoll* v. *Campbell,* 33 F. (2d) 281, the same court held that Section 6 conferred jurisdiction upon the District Court to review the

Commissioner's refusal to grant a permit to use specially denatured alcohol. A permit to use specially denatured alcohol is required by regulation and not by statute. The permits involved in the instant cases and in the *Higgins* v. *Foster case* were required by Section 4. Clearly a Federal District Court may review the Commissioner's refusal to grant a Section 4 permit. It is submitted that the provision of Section 6 conferring this jurisdiction is no broader in its terms than the provision requiring that every permit shall designate and limit the time when the authorized acts may be performed. It follows that if, as held in *Driscoll* v. *Campbell,* the provision for review in Section 6 has the effect of conferring jurisdiction upon the District Court to review the Commissioner's action in refusing a permit to use specially denatured alcohol, which is not one specifically required by statute, then its requirement of what shall be designated and limited in every permit should likewise be held applicable to the permits here involved.

Section 6 directs that every permit shall *designate* and *limit* three things: (1) the acts that are permitted; (2) the time when, and (3) the place where, such acts may be performed. We submit it is plain that when Congress directed that every permit should designate the acts to be permitted and the place where they were to be performed it had in mind a definite and specific designation and not one which would leave open to speculation and

conjecture what acts or place were contemplated by the permit. In no other way could proper control be exercised over permittees. Likewise, and for a similar reason, Congress must have intended that the designation as to "time" should be definite. Not only must the time be *designated*, but the life of the permit must be *limited* to the designated time. The words "designate" and "limit" must be given the same meaning in respect to the "time" as they have with respect to the "acts" and "place." (See *Lewellyn* v. *Harbison* (C. C. A. 3d), 31 F. (2d) 740, 742.) Moreover, the limitation must be in the permit itself. Obviously, if an indefinite designation and indefinite limitation as to the "acts" and "place" will not satisfy the statute, then an indefinite designation and an indefinite limitation as to the "time" are insufficient.

Congress was fully aware of the difficulties always attendant upon efforts to suppress the liquor traffic. (*Donnelley* v. *United States*, 276 U. S. 505, 512–513.) A regulatory or permit system was not new. (*United States* v. *Katz*, 271 U. S. 354, 358–359.) It must have known that permits authorizing indefinite "acts" at an indefinite "place" issued for an indefinite "time" would render impossible of effective enforcement the permit system set up by the Act and defeat its purpose. We submit that when Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation.

The permits here involved recited that they should remain in force until "revoked, suspended, or renewed as provided by law or regulations," or until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto."[1]

We submit that this is no sufficient limitation of time within the requirement of Section 6. Of course a permit would terminate upon "surrender," whether it contained a provision to that effect or not. There is no provision of law for the "suspension" of a permit, and hence the insertion of the word "suspended" was surplusage. In any event, a suspension of a permit would not terminate its life. A permit could not be "renewed" unless it had expired. The futility of limiting the life of a permit to the time of its beginning anew is obvious.

As to "revocation," Sections 5 and 9 of Title II direct that where a permittee is not manufacturing a Section 4 article according to authorized formula, or where he is not in good faith conforming to the National Prohibition Act or has violated a State law relating to intoxicating liquor, the Commissioner shall revoke his permit. These provisions are undoubtedly mandatory. See *Donnelley v. United States*, 276 U. S. 505. If a permit is revoked pursuant to the provisions of Section 5 or

[1] For a history of the regulations and decisions affecting the life of permits, see Appendix, pp. 31–33.

Section 9 it, of course, no longer continues in force. Obviously, a permit would terminate upon revocation even though it did not so provide. Congress in inserting a requirement that every permit shall designate and limit the time within which the acts authorized shall be performed must have had in mind the accomplishment of a purpose other than those to which Sections 5 and 9 relate. We submit that this purpose was the advantage to be afforded by a definite restriction upon the life of permits.

With permits terminating upon definite dates the permittee would be required periodically to apply for renewal of his permit and would have the burden of establishing his right to a new, or the renewal of an old permit. (Sec. 6; *Chicago Grain Products Co.* v. *Mellon, supra.*, p. 364; *Yudelson* v. *Andrews* (C. C. A. 3d), 25 F. (2d) 80, 82–83.) But such purpose is not accomplished by construing Section 6 as authorizing permits which, as held by the court below (R. 35), reserved to the administrative officers no right to terminate except by revocation proceedings particularly prescribed by the Act. Before the Commissioner may revoke an outstanding permit under Section 5 or Section 9 he must hold a hearing and establish one of the grounds of revocation therein specified. We submit that if Congress had intended that permittees should be subject to no more effective control than would be secured through the proceedings for revo-

cation authorized by those sections, it would not have required the limitation of time provided for in Section 6.

It is submitted that a permit having an indefinite time limitation was never authorized by the Act, and that Regulations 2 and 3 merely corrected an unwarranted practice. See *Higgins* v. *Mills*, 22 F. (2d) 913, 914.

III

SECTION 9 OF TITLE II IS NOT A LIMITATION UPON THE QUASI-LEGISLATIVE POWERS DELEGATED TO THE ADMINISTRATIVE OFFICERS

If, as held by the court below, Congress in enacting Section 6 did not intend to provide for the termination of Section 4 permits on a definite date, then we submit that the Act delegated to the Commissioner the power to fix the life of such permits by regulation; that Regulations 2 and 3 were promulgated in pursuance of such power, and that Section 9 of Title II, which relates to the revocation of permits, is not a limitation upon that power.

The National Prohibition Act delegates to the administrative officers certain quasi-legislative functions[1] and confers certain powers in their nature judicial.[2] The grant of power to issue regulations, having the force and effect of laws, is not

[1] Sections 1 (7), 4, and 6 of Title II; Sections 7, 8, 10, 11, and 13 of Title III.

[2] Sections 5, 6, and 9 of Title II.

uncommon (See *United States* v. *Grimaud*, 220 U. S. 506, 516–523; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 378–379; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 287; *Intermountain Rate Cases*, 234 U. S. 476, 486); and that Congress may confer upon administrative officers functions judicial in nature is well settled. See *Ex Parte Bakelite Corporation*, 279 U. S. 438, 452–453, 458. These powers may be united in a single hand. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 377–378, 385; *Keller* v. *Potomac Elec. Co.*, 261, U. S. 428, 442–443; *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452. When so united such powers are not to be confused. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210. That case involved a body created by State constitution and vested with both legislative and judicial powers. In speaking of the distinction to be drawn between the exercise of the two powers the Court said (page 226):

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That

> is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Section 9 of Title II authorizes the revocation of an *individual* permit on present or past facts and under existing laws or regulations. It authorizes the exercise of a function judicial in nature. It guards against arbitrary or capricious action by requiring a hearing and the production of evidence. In *Chicago Grain Products Co.* v. *Mellon, supra,* it was said (p. 363):

> The provisions of section 9, title II, are limited to inquiries to determine whether *a permit shall be canceled for the reasons therein specified.* (Italics ours.)

It is, we submit, no limitation upon and in no way relates to the quasi-legislative power to establish *general* regulations.

Congress conferred the power to make regulations "for carrying out the provisions of this Act" (Section 1 (7), Title II), to "prescribe the form of all permits and applications and the facts to be set forth therein" (Section 6, Title II) and to issue regulations "from time to time" respecting denaturing plants and the distribution, sale and use of alcohol (Section 13, Title III).

A regulation promulgated under these sections "looks to the future and changes existing conditions

by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis* v. *Atlantic Coast Line, supra,* p. 226. The function conferred is legislative in its nature. Since the administrative officers have been given the power to "prescribe the form of all permits," to prescribe regulations "for carrying out the provisions of this Act" and to issue regulations "from time to time" respecting the operation of denaturing plants, it follows that if Congress did not intend by Section 6 to provide for the termination of Section 4 permits on a definite date, it did confer upon the Commissioner the power to fix the life of such permits by regulations.

The power to promulgate regulations is not one to be once used and forever lost. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 638; *Lacquer & Chemical Corporation* v. *Mills,* 22 F. (2d) 697, 699; affirmed 22 F. (2d) 700; certiorari denied, 276 U. S. 617; *Cywan* v. *Blair,* 16 F. (2d) 279, 282; *Millstone* v. *Yellowley,* 290 Fed. 855, 857. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public (*Mugler* v. *Kansas,* 123 U. S. 623) and neither could they by a regulation providing for a permit of indefinite duration confer a vested right which would prevent them from promulgating a subsequent regulation terminating the permit on a day certain, with provision for its renewal, so that

they might have more effective supervision over permittees. As was said in *Cywan* v. *Blair, supra,* p. 282, with respect to T. D. No. 3773, containing provisions similar to Regulations 2 and 3 here involved:

> Perpetuities are not generally favored. The whole field of permit privileges, under not only the Prohibition Act, but all other acts, shows that the common practice is to limit permits for a definite period, renewable at the termination of each period. It is not clear and beyond doubt, as the complainant contends, that the Treasury Decision here involved is not a reasonable regulation.

It is submitted that the right to promulgate general regulations having the effect of general legislation is readily distinguishable from the right to cancel an individual permit or terminate a given right by a regulation or a legislative fiat. The power to curtail or destroy privileges accruing in a field subject to police regulation is inherent in Government. *Mugler* v. *Kansas, supra.* No power to deprive a particular person of a right by legislative fiat is asserted by the administrative officers here involved, and no attempt has been made to exercise such power. It follows, therefore, that Section 9 of Title II is not a limitation upon the quasi-legislative powers delegated to the administrative officers to establish general regulations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decrees of the court below should be reversed.

WILLIAM D. MITCHELL,
Attorney General.

G. A. YOUNGQUIST,
Assistant Attorney General.

MAHLON D. KIEFER,
Chief Attorney.

JOHN H. MCEVERS,
Special Assistant to the Attorney General.

APRIL, 1930.

APPENDIX

STATUTE AND REGULATIONS

The National Prohibition Act, c. 85, 41 Stat. 305, 307–321:

TITLE II

SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * *

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. * * * (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and pre-

pared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

* * * * *

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) * * * medicinal * * * preparations * * * that are unfit for use for beverage purposes.

* * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, * * *. (U. S. C., Title 27, Sec. 13.)

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed

ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the

commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

* * * * *

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in Section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C., Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing

such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

Title III

Sec 10. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export. * * * (U. S. C., Title 27, Sec. 80.)

Sec. 11. Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

* * * * *

But any person permitted to obtain alcohol tax free * * * shall first apply for and secure a

permit to purchase the same and give the bonds prescribed under title II of this Act * * *. (U. S. C., Title 27, Sec. 81.)

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of * * * denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. (U. S. C., Title 27, Sec. 83.)

Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

Sec. 10. (*l*) *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Sec. 218. *All permits to be renewed annually.*—All permits issued and in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed in the manner

hereinafter specified; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year, and if issued after August 31 of any calendar year shall expire on December 31 of the succeeding calendar year, and may be renewed only in the manner hereinafter specified.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * * Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

HISTORY OF REGULATIONS AND TREASURY DECISIONS

On January 16, 1920, Regulations 60 were promulgated. Regulations 60 governed the manufacture of all the articles enumerated in Section 4 of Title II, except denatured alcohol. Section 18 of these Regulations provided that all manufacturing permits issued thereunder prior to August 31 of any year would expire on December 31 of such year, and that all such permits issued from September 1 to December 31 of any year would expire on December 31 of the following year, unless otherwise provided. On January 31, 1920, Regulations 61 were promulgated. These regulations governed the manufacture of denatured alcohol. Article 97 thereof

provided that permits to manufacture denatured alcohol would remain in force until voluntarily surrendered or revoked by the Commissioner.

On March 14, 1924, Regulations 60 were revised so as to provide that manufacturing permits issued under Section 4 of Title II should continue in force until canceled, suspended, revoked or voluntarily surrendered by the permittee. (Section 260, pp. 17–18, Regulations 60, as revised.) On November 14, 1925, Treasury Decision 3773 was promulgated. This Decision provided that all manufacturing permits, including permits to manufacture denatured alcohol, issued prior to August 31 of any calendar year, should expire on December 31 of the same year, and that all manufacturing permits issued after August 31 of any calendar year should expire on December 31 of the succeeding year.

On June 1, 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *Higgins* v. *Foster*, 12 F. (2d) 646, held that Treasury Decision 3773 was void in so far as it attempted to cancel a permit of indefinite duration, issued under Regulations 61, authorizing the manufacture of denatured alcohol.

On September 1, 1926, Treasury Decision 3925, so far as here pertinent, rescinded Treasury Decision 3773.

On November 9, 1926, the Circuit Court of Appeals for the Seventh Circuit, in the case of *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, held that Treasury Decision 3773 was valid. On September 2, 1927, Regulations 2, being a revision of Regulations 60, were promulgated. On August 23, 1927, Regulations 3, being a revision of Regu-

lations 61, were promulgated. Both were effective October 1, 1927. Regulations 2 and 3 substantially reenacted the provisions of Treasury Decision 3773 and purported to terminate all outstanding unlimited manufacturing permits as of the 31st day of December, 1928. (Section 218 of Regulations 2; Article 95 of Regulations 3.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 445

MAURICE CAMPBELL, Federal Prohibition Administrator for the Second District of New York and JAMES M. DORAN, Federal Prohibition Commissioner of the United States, Petitioners.

vs.

W. H. LONG & COMPANY, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEWIS LANDES,
Counsel for Respondent.

(34,576)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 445

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS.

vs.

W. H. LONG & COMPANY, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The decree of the Circuit Court of Appeals was entered on July 15th, 1929, evidently predicated upon its decision in *Higgins* v. *Foster*, 12 Fed. (2nd) p. 646. The Higgins case, although decided in 1926, was not appealed by the Government.

The facts and law of the two other cases that are jointly submitted to the Court by the Government on its application for a writ of certiorari, are entirely at

variance with the case at bar. Those cases involved whiskey permits which were limited as to time. The Long & Co. permit provided that it was to remain in force until surrendered or cancelled for violations.

Question Presented.

The question presented, is whether the Prohibition Authorities can disregard the clear provisions of Title 2 of Section 9 of the National Prohibition Act which sets forth the method to be followed in the revoking of a permit.

Statement.

Respondent was issued a permit by the Prohibition Authorities on August 16th, 1923. The permit is as follows:

> "Application and bond having been duly presented and approved, you are hereby authorized to operate a Denaturing Plant located at 49-51 Beach Street, Porchester, New York and Serial Number 123 is assigned thereto.
>
> This permit authorizes the operation of the above described plant or warehouse, the purchase and receipt of alcohol thereto, and the removal therefrom of the manufactured product for any purpose authorized by law or regulations, from the date hereof until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto.
>
> This permit is not transferable."

The permit provided that it should remain in force until surrendered by the holder, or cancelled by the Commissioner for violation of the National Prohibition Act, or Regulations made pursuant thereto (C. C. A. rec. p. 13).

On October 1st, 1927, the Prohibition Department issued what is known as Regulations 2, Article 95 providing, that all permits in effect on October 1, 1927, expire on December 31st, 1928. The Prohibition Authorities denied the renewal application of W. H. Long & Company, although the application stated it was made without prejudice to its original permit. A suit in equity was filed in the United States District Court, for the Southern District of New York, in which the plaintiff was granted a permanent injunction, restraining the Prohibition Authorities from interfering with the permit of Long & Company, except in a manner provided by the National Prohibition Act. On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the decree of the Court below.

ARGUMENT.

Section 9 of Title 2 of the National Prohibition Act protects the Government in the enforcement of the Law.

Section 6 of Title 2 of the National Prohibition Act, has no relation to denatured alcohol, and there is therefore, no statutory provision which sets a term to such permits whether they be assumed to be authorized by Section 4 of Title 2, or Section 13 of Title 3 of the National Prohibition Act. Title 2 of the National

Prohibition Act specifically defines the particular intoxicating beverages that are effected by Title 2, as follows:

> "Section 1. When used in Title II and Title III of this act (1) the word "liquor" or the phrase "intoxication liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

Title III applies to manufacturers engaged in the denaturing alcohol business.

What the Prohibition Authorities are attempting to do, is to evade the specific provisions of the National Prohibition Act (thereby violating the Act).

The proposition of law in this entire case, was presented to the Circuit Court of Appeals, in *Higgins v. Foster,* both on the direct argument and on the reargument, and counsel quotes from the opinion, as follows:

> • • • "We think that Section 6 of Title II has no relation to denatured alcohol and that there is therefore no statutory provision which sets a term to such permits, whether they be assumed to be authorized by Section 4 of Title II or Section 13 of Title III under which Article 21 of Regulation 61 was promulgated by the Commissioner. Section 6 uses the word

"liquor" which is defined by Section 1 of Title II and which seems to us clearly to be confined to beverages It is true that it uses the word, "Alcohol," but that especially in its context precludes denatured alcohol which is not potable. Hence we think that the permit in its original form was not unlawful and that the regulation of November 14, 1925, did more than confine permits for denatured alcohol to the terms prescribed by statute. Again we do not think that by originally making the permit terminable by cancellation the commissioner could evade or meant to evade, Section 9 of Title II assuming for the moment that that section applied to them. In effect it had an indefinite duration, and was subject only to such revocation as the law allowed. It did not lie within the power of the Commissioner by phrasing the permit in the language chosen to escape any requirements of cancellation which the statute imposed.

Moreover, if Section 9 of Title II applies to permits for denatured alcohol, we cannot see that the Commissioner under the guise of legislation may do in gross what he had no power to do in detail." * * *

* * * "Therefore the question comes to whether Section 9 of Title II applies to denatured alcohol. We think that it does." * * *

* * * "In short, Section 9 protected all holders of permits, whether for potable or non-potable intoxicants, while Section 5 prescribed a particular procedure in the case of non-potable permits when the fault lay in the quality of the product.

As Section 9 of Title II precribed that the delinquent must have fifteen days' notice and be

served with a statement of the facts on which he was to suffer revocation, it applied to the plaintiff, if we are right, and the regulation of November fourteenth, 1925, denied him a right which the statute gave him." * * *

On reargument, the Circuit Court of Appeals for the Second Circuit, reasserted its position taken in the original opinion, and said in part as follows:

* * * "It is plain that when the statute was passed there was no suspicion of the ease with which denaturants could be revoked. That, however, can mean no more than that some amendment in the act is necessary to check the grave evil which has now arisen." * * *

The Prohibition Authorities recognizing the defect in the Law, have endeavored to remedy same by introducing in the Senate by Senator Cummins, Senate Bill No. 4102, as follows:

"A BILL

To amend section 6 of Title II of the Act of Congress of October 28, 1919, entitled, the 'National Prohibition Act' as amended and supplemented, is hereby amended by striking out the first sentence thereof and substituting therefor the following:

"The Commissioner shall have the authority to supervise the use of all permits issued under Title II and Title III of the National Prohibition Act, and to refuse to issue, or to refuse to renew any such permits at their expiration, when, in his reasonable discretion, the issuance

of the renewal thereof tends to defeat the purposes of the National Prohibition Act. All permits now in effect or hereafter issued pursuant to the provisions of Title II and Title III of the National Prohibition Act shall be considered as having been issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond, extend any permit, granted under Title II and Title III of the National Prohibition Act, or laws now in force, after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be enforced to exceed ninety days from the day of issuance.

"The commissioner, with the approval of the Secretary, may issue such regulations as may be necessary to carry out the provisions of the National Prohibition Act."

As was said by the lower court, Congress is the proper place for the Prohibition Authorities to present their difficulties, if they have any.

If the Prohibition Authorities believe that a denaturing plant is not complying with the terms and conditions set forth in the Regulations, it is their duty to proceed to revoke the permit under *Title 2 of Section 9* of the National Prohibition Act, which specifically provides the manner in which a permit can be revoked.

U. S. v. *Katz,* 271 U. S. 353, has no bearing upon the issues in this case, neither have the other cases which have been quoted by the Government.

Yudelson vs. *Campbell*, 25 Fed. (2nd) p. 80, has to do with the refusal of an application for a new permit, and not based upon the cancellation of an outstanding permit, such as in the case at bar.

The National Prohibition Act specifically provides, that a hearing shall be granted, before a permit shall be revoked.

Chicago Grain Products vs. *Mellon*, appearing in 14 Fed. (2nd) p. 362, seems to be predicated upon a proposition entirely foreign to the one that was presented to the Circuit Court of Appeals, Second Circuit, in the case of *Higgins* vs. *Foster*.

THE COMMISSIONER OF INTERNAL REVENUE CANNOT MAKE NEW REGULATIONS REVOKING OR CANCELLING A PERMIT ALREADY ISSUED, EXCEPT IN THE MANNER PROVIDED FOR UNDER THE NATIONAL PROHIBITION ACT.

Title 2, Section 9 of the National Prohibition Act, provides as follows:

> "That only if it be found that such person has been guilty of willfully violating any such laws as charged, shall his permit be revoked." * * *

What the Government is attempting to do in this case, is to wipe out a business of the respondent, in clear violation of this provision. The Prohibition Authorities is attempting to evade the specific provisions of an Act of Congress.

No citation has ever been issued against the Respondent, notwithstanding the specific provisions of the Act itself.

A regulation is nothing more than an expression of opinion.

Judge Mayer for the Circuit Court of Appeals in this District, in *Douglas* v. *Edwards*, 298 Fed. Rep., p. 245, said on the question of Regulations:

> "We have not overlooked the treasury regulation (article 107 of Regulations 33, Revised), which interpreted the statute substantially as defendant contends. We are also mindful of the rule that the regulations and practices of administrative departments are entitled to weight and serious consideration in construing a statute; but opposed to this rule is the familiar one that it is for the courts to construe a statute, and not the executive departments of the Government, and where, as here, we are satisfied that the statute requires the construction which we have attributed to it, *a treasury regulation rises to no higher dignity than an expression of opinion.*" (Italics ours.)

The New York Court of Appeals on December 7th, 1925, in *Picone* v. *Commissioner of Licenses*, 241 N. Y. 157, Judge Pound for the Court stated:

> "Laws are made by the law-making powers, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be"—

In *Friedler* v. *Moss*, 287 Fed. Rep., p. 935, Judge Runyon held as follows:

"I believe that a hearing must first be had under the terms of Section 9 of Title 2, and a defendant be found guilty as charged before there can be a revocation of the permit. If any other interpretation is to be given to the language of this section it will virtually mean that a permittee can to all intents and purposes be adjudged guilty before having any chance whatever to defend himself, and it is entirely possible that this condition might depend upon irresponsible information. If the permittee upon a hearing shall be found guilty of law violation, or of not having acted in good faith, the clause concerning revocation of his permit is mandatory in such Section."

"While this finding is at variance with the language of "Treasury Decision No. 3881," it cannot be argued—

"I am sure, that any official has not the right to exercise authority or to promulgate rules and regulations, except as they have their basis in the original law. I cannot believe that the framers of the National Prohibition Act intended that there should be in any set of circumstances such as those presented in this case a prejudgment or that a business to all intents and purposes legitimate should be held liable to be ruined without a fair hearing and finding of guilt first being had. In this connection the language of Judge Lynch in the matter of New Jersey Wholesale Drug Company *vs.* Brown is appropriate wherein it says 'it would be unjust and unfair to suspend a permit without a hearing, so a hearing was provided for. The authority to arbitrarily prevent the holder of a permit from doing business does not reside in any offi-

cial. The hearing must first be accorded. This I think, is the plain meaning of Section 9.'

"For the above reasons, I am of the opinion that the complainant is entitled to the preliminary injunction prayed for."

In *New Jersey Wholesale Drug Co.* v. *Brown*, reported in 289 Fed. Rep. p. 110, Judge Lynch held as follows:

> "A permit is a property right in the holder to do business. It would be unjust and unfair to suspend it without a hearing, so a hearing was provided for. The authority to arbitrary prevent the holder of a permit from doing business does not appear to reside in any official. The hearing must first be accorded. This I think is the plain meaning of Section 9.

In *Fred Feil Brewing Co.* v. *Blair*, Fed. Rep. Vol. 2 (2d) p. 879, Judge Thompson said:

> "My conclusion therefore is that the Commissioner has no authority to refuse a permit unless based upon some lawful ground, and that lawful ground does not include an arbitrary discretion based upon personal judgment, but must be a judicial discretion based upon some legal ground. If the Commissioner has evidence that a manufacturer has violated the law * * *."

In *Burlington Industrial Alcohol Co.* v. *Blair*, decided on August 13th, 1925, by Judge Manton of this Court, he said:

"The law involved in the issues presented in in this case was very fairly stated by Judge Thompson in Fiel Brewing Company *vs.* Blair, 2 Fed. Rep. 2d series, 879, and by Judge Anderson in the District of Massachusetts in McGill *v.* Mellon. There, both Judges considered the National Prohibition Act, Title 2, Sections 5 and 6."

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"The Legislature can no more delegate its power to repeal a law than it can to enact one, and it must follow that it cannot delegate its power to suspend the operation of a law, as that in effect is a repeal. This act confers an arbitrary power upon the officials named to 'suspend the privileges' under liquor law certificates already issued or thereafter to be issued, and to prohibit the sale of alcoholic beverages during the whole or a part of the duration of the present war. No rule or regulation is laid down for the guidance of the officials clothed with this power. There is no limitation even upon the exercise of the power. The power granted is absolute. There is nothing to insure any uniformity of action. The officials are left to act as they deem proper. In a word, they are to legislate. Such an act cannot be upheld. People *v.* Klenck Packing Co., 214 N. Y. 121-138, 140 (101 Misc. at 26), the Court said:

"Originally, a 'license' to sell liquor was a mere privilege. It did not involve any right of property, so it could be revoked or sus-

pended pursuant to legislative authority and the holder of it had no legal ground for redress. Metropolitan Board of Excise *v.* Barrie, 34 N. Y., 657, Kresser *v.* Lyman, 74 Fed. Rep. 765. But this is not true of the liquor tax certificates issued under the provisions of the Liquor Tax Law which was first enacted in 1896. Under that law certificates are no longer issued as matter of discretion, but are obtainable as matter of right, if the statutory requirements are met. Under that law the liquor tax certificate confers upon its holder a property right which is well recognized. Matter of Lyman, 160 N. Y., 96; Matter of Livingston, 24 App. Div. 51; Matter of Lyman (Texter certificate), 59 *id.* 217-220. Such a certificate constitutes a contract with the state. Matter of Hilliard, 25 App. Div. 222-225; Affid. 155 N. Y. 702. A license or privilege for selling liquor which does not involve or constitute a property right can be revoked or suspended as already shown, and there are many other authorities to that effect. Stone *v.* Mississippi, 101 U. S. 814; Butcher Union Co. *v.* Crescent City Co., 111 *idem.* 746; Mugler v. Kansas, 123 *item.* 623. On the other hand, where the authorization to sell liquor constitutes a property right it had never been held that it can be taken away, unless proper compensation is made. On the contrary, it has been expressly held that an act passed upon the liquor tax certificate had been issued which purported to empower the commissioner to revoke the certificate under certion conditions was invoked.' "

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> "The privilege or right which it confers upon the holder cannot be revoked except in the matter and for the causes provided in the Statute. The holder may invoke the general rules of law for the protection of property in any proceeding, having for its object the forfeiture or destruction of the right which the Certificate confers. A party cannot be subjected to a forfeiture of his rights of property upon a summary investigation before a Judge or Magistrate, but only upon an indictment, or criminal charge conducted according to the Rules governing criminal procedure and after a conviction by a jury. The power to fine and imprison and to forfeit the Certificate depends upon the same condition, and that is the conviction of the offender."

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> "An examination of Titles 2 and 3 of the National Prohibition Law satisfies me that the proceeding looking to the revocation of plaintiffs' permits were properly laid under the provisions of Section 9 of Title 2 of the Act. Section 1 of that Title defines the permit 'permit' as it is used in both Titles 2 and 3 and in Section 13 of that portion of the latter Title that is headed 'general provisions,' the Commissioner is authorized to issue Regulations 'to

prevent the diversion of alcohol to illegal uses.'

"The permits that were held by complainant were issued under Regulations so made."

"Reverting to Section 9 it is provided that:

" 'If at any time there shall be filed with the Commissioner a complaint under oath setting forth facts showing, or if the Commissioner has reason to believe that any person who has a permit is not in good faith conforming to the provisions of the Act.'

the proceedings specified in the Sections having for their purposes the revocation of the permits, may be instituted."

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"Of course such changes as may be made cannot divest permittees of any rights they may possess as to the inability of the Commissioner to cancel and revoke permits, unless for causes shown in the matter provided by the statute.

"In the absence of due provocation through violation of regulations by the law by the permittee or his agents, the Commissioner cannot use his new regulations as a means by which to cancel and revoke an outstanding permit."

In *Swanson* v. *Blair* and *Beach Chemical Company* v. *Blair et al.*, Judge Dickinson in the United States District Court, Eastern District of Pennsylvania, held in one opinion applying to both cases, Dec., 1925, as follows:

"A permit has been issued to the plaintiffs to engage in the industrial alcohol business in which they had invested over a quarter of a million dollars. The permit expressly stated that it should be enjoyed until surrendered or revoked in accordance with the law. No renewals or re-issues were required, the original permit continuing in force as of course. This permit had been duly issued in accordance with law and the regulations then in force. The plaintiffs by its authority carried on its business under the direct supervision and continuous inspection of the Department, and so far as the plaintiffs knew in faithful compliance with the regulations and certainly with all orders and instructions given them. No complaints were lodged and no objections made to the manner in which the business was being conducted, and as it was conducted under the supervision and direction of the enforcement officers themselves, no complaints or objections were expected. Some time later (the date of which we were not told) the Department changed its regulations so that permits were limited to the duration of a year and annual applications and renewals or re-issues became necessary. As soon as the new regulations went into effect a revocation proceeding was begun against the permittee in accordance with the Act of Congress. We are relieved of the duty of inquiring into this complaint as it was not pressed, but the proceedings were abandoned and no order of revocation was in form made. It may possibly be that the proceedings were wholly for *in terrorem* purpose because following them about December 10th, 1925 the Department called upon the permittees to file an application for the renewal

of their permit, accompanied with a copy of the new regulations, by the terms of which the permit expired with December 31st, following. Naturally the permittees took this demand to their counsel and just as naturally he accompanied the transmission of the application with a lawyer-like marginal note protesting that the permittees claimed everything and waived nothing. They did, however, in fact file their application. The application, without further notice to the permittee or opportunity to be heard, was returned to them on the last day of the year (the letter returning it being dated December 29th, 1925) with the following comment:

"After careful review of report of investigating officers you are advised that your application has been disapproved—

"As this implies that there has been an investigation a report thereon and a 'careful review' thereof, no complaint can be made of any lack of promptness or indeed celerity in their action. Following thus, on January 2d, 1926, the permittees were put out of business.

"On this fact statement, counsel for plaintiffs submitted for the decision of the Court the two questions of (1) whether the permittees had been denied their rights in violation of the Act of Congress, and (2) if so, whether the act of denial was subject to the courts." * * *

"All of which is now ruled are the two propositions, (1) that the plaintiffs cannot be deprived of any privileges which are theirs otherwise than in accordance with the Acts of Congress and (2) that the plaintiffs have been deprived of their rights in violation of law and should have them restored." * * *

Judge Anderson in *McGill* v. *Mellon*, 5 Fed. Rep. (2d) 262, said in part as follows:

> "It is important to note that Congress had not undertaken to prohibit the industrial use of alcohol. It is at least doubtful whether Congress would have power to prohibit such use. Certainly there is nothing in the Eighteenth Amendment grounding such power. It is unnecessary to discuss the constitutional question; for the National Prohibition Act shows clearly that Congress had no purpose of attempting to prohibit the use of alcohol in manufacturing perfumes, or otherwise in the industrial arts." * * *

Counsel respectfully refers the Court to the decision of the Court of Appeals for the District of Columbia in *Herman Chemical Co.* v. *Blair*, decided by Chief Justice Martin on April 22, 1924.

The acts of the Prohibition Authorities here, very clearly show that they have no legal evidence to justify the revocation of a permit, and therefore attempt to vitiate the acts of Congress, by using the word "cancelling" instead of "revoking."

If the power assumed by the Prohibition Commissioner is illegal, he could not only make a permit expire on December 31st of a year, but he could at his own will say a permit can expire one week or one month after its issuance. Such a procedure will not be tolerated. THE RESPONDENT FEELS CONFIDENT THAT THE COURTS WILL NOT APPROVE THE ACTS OF THE AUTHORITIES IN ALLOWING A MAN TO INVEST THOUSANDS AND THOUSANDS OF DOLLARS IN ITS BUSINESS, AND WITH ONE

SWEEP OF THE PEN WIPE OUT ITS BUSINESS EVEN THOUGH THE AUTHORITIES HAVE NO EVIDENCE OF VIOLATION OF THE LAW.

If the acts of the Prohibition Authorities are approved, it will mean that business and economic life will be held at the mercy of persons who at the time might be Prohibition Administrators and Inspectors, and will be bound by the mere whim and caprice of new officials. The position of the Government is that considerable confusion has been created by reason of the decision of *Higgins* v. *Foster*. The Treasury Officials in Washington have been confused, because they clearly understand what the Circuit Court of Appeals meant by *Higgins* vs. *Foster*.

Conclusion.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE DENIED.

Respectfully submitted,

LEWIS LANDES,
Solicitor for W. H. Long & Company, Inc.

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CHARLES ELMOR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 445

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK, AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS,

vs.

W. H. LONG & COMPANY, INC.

BRIEF FOR THE RESPONDENT.

LEWIS LANDES,
Counsel for Respondent.

(34,576)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 445

MAURICE CAMPBELL, Federal Prohibition Administrator for the Second District of New York, and JAMES M. DORAN, Federal Prohibition Commissioner of the United States, Petitioners,

vs.

W. H. LONG & COMPANY, INC., Respondent.

BRIEF FOR THE RESPONDENT.

Appeal from a decree of the Circuit Court of Appeals, Second Circuit, entered on the 15th day of July, 1929. The Petition for Writ of Certiorari was allowed on December 2nd, 1929 (R. 98-99).

Questions Presented.

Can the Prohibition Authorities of the United States circumvent the provisions of the National Prohibition

Act, which specifically provides the manner in which permits can be revoked?

The Respondent was issued a permit on August 16th, 1923, by the Prohibition Authorities, to operate and conduct a denaturing plant.

On October 1st, 1927, the Prohibition Department issued a regulation, known as number 3, Article 95.

The Respondent filed a renewal application, and did so without prejudice to its original permit. The renewal application was denied on December 27th, 1928 (fol. 196).

A suit in equity was instituted in the United States District Court, for the Southern District of New York, in which a decree was entered in favor of the Respondent, restraining the Prohibition Authorities from interfering with the permit of the Respondent, except in the manner provided by law. The Circuit Court of Appeals for the Second Circuit, affirmed the decree of the Court below, without opinion.

ARGUMENT.

Section 9 of Title 2 of the National Prohibition Act, amply protects the Government in the enforcement of the law. Section 6 of Title 2 of the National Prohibition Act, has no relation to denatured alcohol, and there is therefore, no statutory provision which sets a term to such permits, whether they be assumed to be authorized by Section 4 of Title 2, or Section 13 of Title 3 of the National Prohibition Act. Title 2 of the National Prohibition Act specifically defines the particu-

lar intoxicating beverages that are affected by Title 2, as follows:

> "SECTION 1. When used in Title II and Title III of this act (1) the word "liquor" or the phrase "intoxication liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

Title III of the National Prohibition Act applies to manufacturers engaged in the denaturing alcohol business.

What the Prohibition Authorities are attempting to do, is to evade the specific provisions of the National Prohibition Act, in so far as the cancelling of respondent's permit (thereby violating the Act), they are amply protected against wrong doing by a permittee, under Section 9, Title 2.

The proposition of law in this entire case, was presented to the Circuit Court of Appeals, in *Higgins* v. *Foster*, 12 Fed. (2d) 646, both on the direct argument, and on the reargument, and counsel quotes from the opinion, as follows:

> * * * "We think that Section 6 of Title II has no relation to denatured alcohol and that there is therefore no statutory provision which sets a term to such permits, whether they be as-

sumed to be authorized by Section 4 of Title II or Section 13 of Title III under which Article 21 of Regulations 61 was promulgated by the Commissioner. Section 6 uses the word "liqour" which is defined by Section 1 of Title II and which seems to us clearly to be confined to beverages. It is true that it uses the word, "Alcohol", but that especially in its context precludes denatured alcohol which is not potable. Hence we think that the permit in its original form was not unlawful and that the regulation of November 14, 1925, did more than confine permits for denatured alcohol to the terms prescribed by statute. Again we do not think that by originally making the permit terminable by cancellation the Commissioner could evade or meant to evade, Section 9 of Title II assuming for the moment that that section applied to them. In effect it had an indefinite duration, and was subject only to such revocation as the law allowed. It did not lie within the power of the Commissioner by phrasing the permit in the language chosen to escape any requirements of cancellation which the statute imposed.

"Moreover, if Section 9 of Title II, applies to permits for denatured alcohol, we cannot see that the Commissioner under the guise of legislation may do in gross what he had no power to do in detail." * * *

* * * "Therefore, the question comes to me whether Section 9 of Title II applies to denatured alcohol. We think that it does." * * *

* * * "In short, Section 9 protected all holders of permits, whether for potable or non-potable intoxicants, while Section 5 prescribed

a particular procedure in the case of non-potable permits when the fault lay in the quality of the product.

"As Section 9 of Title II prescribed that the delinquent must have fifteen days' notice and be served with a statement of the facts on which he was to suffer revocation, it applied to the plaintiff, if we are right, and the regulation of November fourteenth, 1925, denied him a right which the statute gave him."

On reargument, the Circuit Court of Appeals for the Second Circuit, reasserted its position taken in the original opinion, and said in part as follows:

* * * "It is plain that when the statute was passed there was no suspicion of the ease with which denaturants could be revoked. That, however, can mean no more than that some amendment in the act is necessary to check the grave evil which has now arisen." * * *

If the Prohibiion Authorities believe that a denaturing plant is not complying with the terms and conditions set forth in the Regulations, it is their duty to proceed to revoke the permit under Title 2 of Section 9 of the National Prohibition Act, which specifically provides the manner in which a permit can be revoked.

U. S. v. *Katz,* 271 U. S. 353, has no bearing upon the issues in this case, neither have the other cases which have been quoted by the Government.

Yudelson v. *Campbell,* 25 Fed. (2d), p. 80, has to do with the refusal of an application for a new permit, and not based upon the cancellation of an outstanding permit, such as in the case at bar.

The National Prohibition Act specifically provides, that a hearing shall be granted, before a permit shall be revoked.

Chicago Grain Products Co. v. *Mellon,* 14 Fed. (2d), p. 362, seems to be predicated upon a proposition entirely foreign to the one that was presented to the Circuit Court of Apepals, Second Circuit, in the case of *Higgins* v. *Foster.*

THE COMMISSIONER OF INTERNAL REVENUE CANNOT MAKE NEW REGULATIONS REVOKING OR CANCELLING A PERMIT ALREADY ISSUED, EXCEPT IN THE MANNER PROVIDED FOR UNDER THE NATIONAL PROHIBITION ACT.

Title 2, Section 9, of the National Prohibition Act, provides as follows:

> "That only if it be found that such person has been guilty of willfully violating any such laws as charged, shall his permit be revoked." * * *

No citation has ever been issued against the Respondent, notwithstanding the specific provisions of the Act itself.

A regulation is an expression of opinion.

Judge Mayer for the Circuit Court of Appeals in this District, in *Douglas* v. *Edwards,* 298 Fed. Rep., p. 245, said on the question of Regulations:

> "We have not overlooked the treasury regulations (article 107 of Regulations 33, Revised),

> which interpreted the statute substantially as defendant contends. We are also mindful of the rule that the regulations and practices of administrative departments are entitled to weight and serious consideration in construing a statute; but opposed to this rule is the familiar one that it is for the courts to construe a statute, and not the executive departments of the Government, and where, as here, we are satisfied that the statute requires the construction which we have attributed to it, *a treasury regulation rises to no higher dignity than an expression of opinion.*" (Italics ours.)

The New York Court of Appeals on December 7th, 1925, in *Picone* v. *Commissioner of Licenses,* 241 N. Y. 157, Judge Pound for the Court stated:

> "Laws are made by the law-making powers, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be" * * *

In *Friedler* v. *Moss,* 287 Fed. Rep. p. 935, Judge Runyon held as follows:

> "I believe that a hearing must first be had under the terms of Section 9 of Title 2, and a defendant be found guilty as charged before there can be a revocation of the permit. If any other interpretation is to be given to the language of this section it will virtually mean that a permittee can to all intents and purposes be adjudged guilty before having any chance whatever to defend himself, and it is entirely possible that this condition might depend upon irresponsible information. If the permittee

upon a hearing shall be found guilty of law violation, or of not having acted in good faith, the clause concerning revocation of his permit is mandatory in such Section."

"While this finding is at variance with the language of "Treasury Decision No. 3881," it cannot be argued * * *

"I am sure, that any official has not the right to exercise authority or to promulgate rules and regulations, except as they have their basis in the original law. I cannot believe that the framers of the National Prohibition Act intended that there should be in any set of circumstances such as those presented in this case a prejudgment or that a business to all intents and purposes legitimate should be held liable to be ruined without a fair hearing and finding of guilt first being had. In this connection the language of Judge Lynch in the matter of New Jersey Wholesale Drug Company *vs.* Brown is appropriate wherein it says 'it would be unjust and unfair to suspend a permit without a hearing, so a hearing was provided for. The authority to arbitrarily prevent the holder of a permit from doing business does not reside in any official. The hearing must first be accorded. This I think, is the plain meaning of Section 9.'

"For the above reasons, I am of the opinion that the complainant is entitled to the preliminary injunction prayed for."

In *New Jersey Wholesale Drug Co.* v. *Brown,* reported in 289 Fed. Rep., p. 110, Judge Lynch held as follows:

"A permit is a property right in the holder to do business. It would be unjust and unfair

to suspend it without a hearing, so a hearing was provided for. The authority to arbitrary prevent the holder of a permit from doing business does not appear to reside in any official. The hearing must first be accorded. This I think is the plain meaning of Section 9."

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"After careful review of report of investigating officers you are advised that your application has been disapproved.

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"On this fact statement, counsel for plaintiffs submitted for the decision of the Court the two questions of (1) whether the permittees had been denied their rights in violation of the Act of Congress, and (2) if so, whether the act of denial was subject to the courts." * * *

"All of which is now ruled are the two propositions, (1) that the plaintiffs cannot be deprived of any privileges which are theirs otherwise than in accordance with the Acts of Congress and (2) that the plaintiffs have been deprived of their rights in violation of law and should have them restored." * * *

Judge Anderson in *McGill* v. *Mellon*, 5 Fed. Rep. (2d) 262, said in part as follows:

"It is important to note that Congress had not undertaken to prohibit the industrial use of alcohol. It is at least doubtful whether Congress would have power to prohibit such use. Certainly there is nothing in the Eighteenth Amendment grounding such power. It is unnecessary to discuss the constitutional question; for the National Prohibition Act shows clearly that Congress had no purpose of attempting to prohibit the use of alcohol in manufacturing perfumes, or otherwise in the industrial arts." * * *

Counsel respectfully refers the Court to the decision of the Court of Appeals for the District of

Columbia in *Herman Chemical Co.* v. *Blair*, decided by Chief Justice Martin on April 22, 1924.

The acts of the Prohibition Authorities here, very clearly show that they have no legal evidence to justify the revocation of a permit, and therefore attempt to vitiate the acts of Congress, by using the word "cancelling" instead of "revoking."

IF THE POWER ASSUMED BY THE PROHIBITION COMMISSIONER IS ILLEGAL, HE COULD NOT ONLY MAKE A PERMIT EXPIRE ON DECEMBER 31ST OF A YEAR, BUT HE COULD AT HIS OWN WILL SAY A PERMIT CAN EXPIRE ONE WEEK OR ONE MONTH AFTER ITS ISSUANCE. SUCH A PROCEDURE WILL NOT BE TOLERATED. THE RESPONDENT FEELS CONFIDENT THAT THE COURTS WILL NOT APPROVE THE ACTS OF THE AUTHORITIES IN ALLOWING A MAN TO INVEST THOUSANDS AND THOUSANDS OF DOLLARS IN ITS BUSINESS, AND WITH ONE SWEEP OF THE PEN WIPE OUT ITS BUSINESS EVEN THOUGH THE AUTHORITIES HAVE NO EVIDENCE OF VIOLATION OF THE LAW.

In *Casper* v. *Doran et al.*, 30 Fed. (2d), p. 400, it was held in part as follows:

> * * * "The argument built upon the theory that these permittees voluntarily 'surrendered' the permits originally granted to them and accepted permits limited to a year is likewise wanting in persuasiveness. Such a theory is

wholly disingenuous. No one could find such a surrender in fact. It has no existence, except as a figment, and, moreover, we are here dealing with a proposition of law, to wit, whether a permittee, otherwise with the right to a supply of alcohol, can be deprived of that right in any way other than the way provided by the law. Surely the permittee cannot change the law, nor can any department of the government, nor can the two of them acting together.

"The final stand of the permit authorities is upon the power to make rules and regulations which have the force of law under section 13 of title 3. 27 U. S. C. A. section 83. The language of this section gives no aid to any argument built upon it that the permit authorities can revoke a permit otherwise than by a judicial finding, based upon proven evidentiary facts. The suggestion that they are not revoking the basic permit granted to this permittee, but merely cutting off his supply of alcohol, has no force. A basic permit is defined to be a permit to engage in the business of manufacturing some one or more of nonpotable articles and to obtain a supply of alcohol for this purpose. To deny the supply is to revoke the permit." * * *

There is no question of permittee's permit (respondent) being revoked here. If a permittee is not acting in good faith, Section 9 of Title 2 of the National Prohibition Act amply provides the procedure by which a permit can be revoked.

IF THE ACTS OF THE PROHIBITION AUTHORITIES ARE APPROVED, IT WILL MEAN THAT BUSINESS AND ECONOMIC LIFE WILL

BE HELD AT THE MERCY OF PERSONS WHO AT THE TIME MIGHT BE PROHIBITION ADMINISTRATORS AND INSPECTORS, AND WILL BE BOUND BY THE MERE WHIM AND CAPRICE OF NEW OFFICIALS. THE POSITION OF THE GOVERNMENT IS THAT CONSIDERABLE CONFUSION HAS BEEN CREATED BY REASON OF THE DECISION OF *HIGGINS* v. *FOSTER*. THE TREASURY OFFICIALS IN WASHINGTON HAVE BEEN CONFUSED, BECAUSE THEY CLEARLY UNDERSTAND WHAT THE CIRCUIT COURT OF APPEALS MEANT BY *HIGGINS* v. *FOSTER*.

Conclusion.

IT IS RESPECTFULLY SUBMITTED THAT THE DECREE SHOULD BE AFFIRMED.

Respectfully submitted,

LEWIS LANDES,

Solicitor for W. H. Long & Company, Inc.

CLERK'S COPY.

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 510

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.

vs.

SWANSON CHEMICAL CORPORATION

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED DECEMBER 16, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 510

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.

VS.

SWANSON CHEMICAL CORPORATION

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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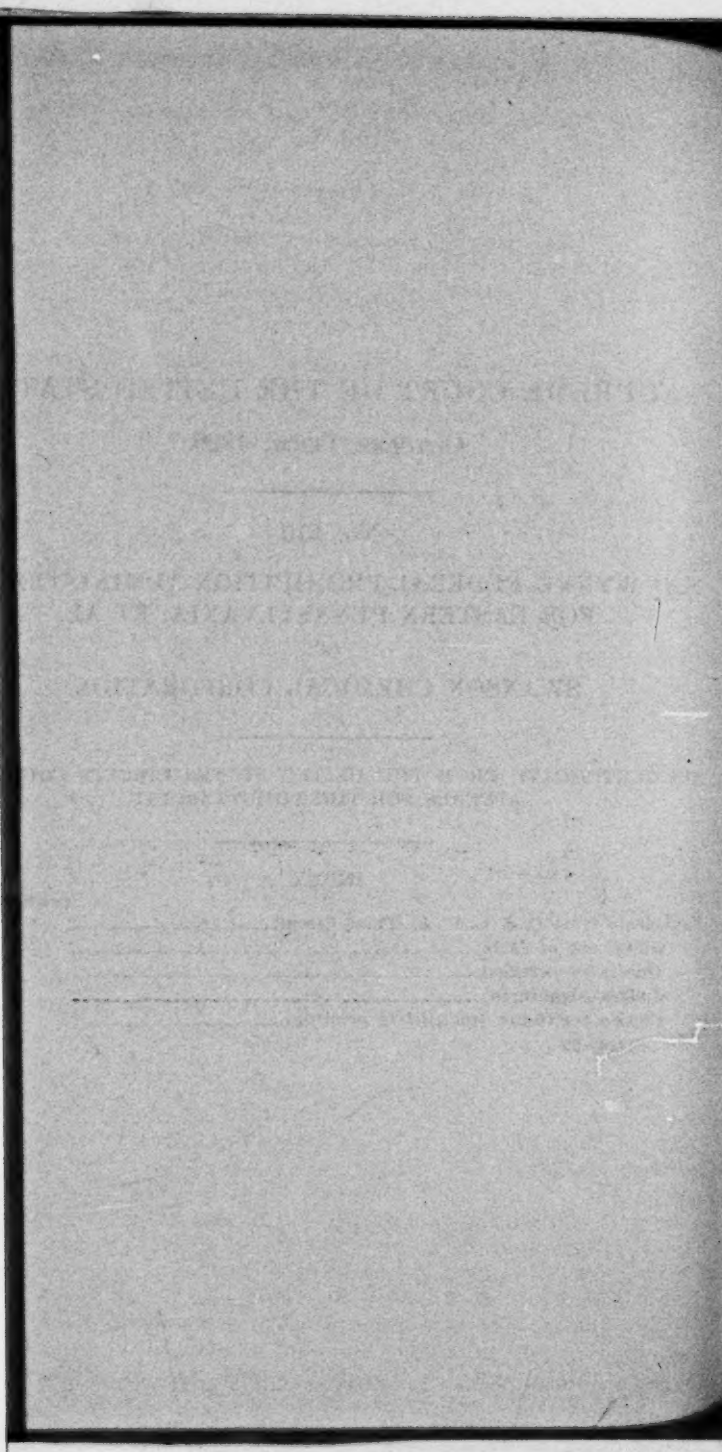

1 In United States Circuit Court of Appeals for the Third Circuit

No. 4119, October term, 1929

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN Pennsylvania, and James M. Doran, Prohibition Commissioner for the United States, defendants-appellants

v.

SWANSON CHEMICAL CORPORATION, COMPLAINANT-APPELLEE

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges

Certificate to the Supreme Court

Filed Dec. 6, 1929

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and under authority of section 239 of the Judicial Code certifies three questions of law which arise from the following facts:

Statement of facts

On October 7, 1924, a permit authorizing the operation of a denaturing plant, the purchase and receipt of pure alcohol thereat, the denaturing thereof, and the removal therefrom of the denatured alcohol was issued to Swanson Chemical Corporation. The permit provided that it should be in effect "* * * from the date
2 hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 95 of Regulations 3 provided that all permits to operate denaturing plants, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to article 95 the permittee, saving all rights it might have under its original permit, on August 14, 1928, filed an application for renewal. Following an investigation the administrator disapproved the application on the grounds that the applicant was not a fit person to be entrusted with a permit, that it had violated the terms of the national prohibition act, that it had sold the alcohol denatured by it under circumstances from which it or its officers might reasonably deduce the intention of the purchaser to use the same for beverage purposes, and that it had assisted in the diversion of alcohol

for beverage purposes. The permittee was advised that it might apply for a hearing upon its application for a renewal of its permit, but it refused to do so.

A bill in equity was thereupon filed by the Swanson Chemical Corporation in the District Court for the Eastern District of Pennsylvania, asking for an injunction restraining the administrative officers from interfering with the carrying on of the business authorized by the terms of the original permit. An injunction was issued, and the defendants appealed.

3 *Questions certified*

The questions of law growing out of the foregoing facts upon which the Circuit Court of Appeals desires the instructions of the Supreme Court are these:

1. Is denatured alcohol, during its manufacture and preparation for the market, "liquor" within the meaning of sections 1 and 6, Title II, of the national prohibition act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

If the answer to the first question be in the negative, we ask:

2. Does the provision of section 6, Title II, of the national prohibition act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to operate a denaturing plant, i. e., to use alcohol in the manufacture of denatured alcohol?

If the answer to the first question be in the negative and the answer to the second question be in the affirmative, then we ask:

3. Does a provision in a permit that it shall be in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto," comply with the above-mentioned requirement of section 6 of Title II of the national prohibition act, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the first question be answered in the negative and if the second and third questions be answered in the affirmative, then we ask:

4 4. May a permit to operate a denaturing plant, which permit provides that it shall be in force "until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

JOSEPH BUFFINGTON,
VICTOR B. WOOLLEY,
J. WARREN DAVIS,
Circuit Judges.

[File endorsement omitted.]

5 [Clerk's certificate to foregoing omitted in printing.]

[Endorsement on cover:] File No. 34641. U. S. Circuit Court of Appeals, Third Circuit. Term No. 510. S. O. Wynne, Federal prohibition administrator for eastern Pennsylvania, et al., vs. Swanson Chemical Corporation. Certificate. Filed December 10, 1929. File No. 34641.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CLERK'S COPY.

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 511

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.

vs.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED DECEMBER 19, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 511

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.

VS.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States Circuit Court of Appeals for the Third Circuit

No. 4128, October term, 1929

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, and Samuel O. Wynne, Federal Prohibition Administrator for the Eastern District of Pennsylvania, defendants-appellants

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY, complainant-appellee

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges

Certificate to the Supreme Court

Filed Dec. 6, 1929

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and under authority of section 239 of the Judicial Code certifies three questions of law which arise from the following facts:

Statement of facts

On March 23, 1923, a permit authorizing the use of specially denatured alcohol in the manufacture of toilet preparations was
2 issued to Martin H. Casper. The permit provided that it "shall be in effect from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 113 of Regulations 3 provided that all permits of the class issued to Casper, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to article 113 Casper, on August 28, 1928, filed an application for a renewal of his permit. Following an investigation the administrator notified Casper that his application had been disapproved on the grounds that he had not exercised his permit privileges in good faith and was not a fit person to be entrusted therewith. The permittee was advised that he might apply for a hearing upon his application for a renewal of his permit, but he refused to do so.

Casper thereupon filed a bill in equity in the District Court for the Eastern District of Pennsylvania asking for an injunction re-

straining the administrative officers from interfering with his permit privileges "unless and until the same shall have been revoked * * * pursuant to citation duly issued and hearing had thereon." An injunction was issued and the defendants appealed.

The questions of law growing out of the foregoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court are these:

Questions certified

1. Does the provision of section 6, Title II, of the national
3 prohibition act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to use specially denatured alcohol?

If the answer to the first question be in the affirmative, we ask:

2. Does a provision in a permit that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or regulations made pursuant thereto" comply with the aforesaid requirement of section 6, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the answer to the first question be in the negative or if the answer to the second question be in the affirmative, then we ask:

3. May a permit to use specially denatured alcohol in the manufacture of toilet preparations, which permit provides that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or the regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

JOSEPH BUFFINGTON,
VICTOR B. WOOLLEY,
J. WARREN DAVIS,
Circuit Judges.

[File endorsement omitted.]

4 [Clerk's certificate to foregoing omitted in printing.]

[Endorsement on cover:] File No. 34642. U. S. Circuit Court of Appeals, Third Circuit. Term No. 511. James M. Doran, prohibition commissioner of the United States, et al., vs. Martin H. Caspe, trading as Delmar Manufacturing and Chemical Company. Certificate. Filed December 10, 1929. File No. 34642.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

FILED
FEB 18 1930
CHARLES ELMORE CROPLEY
CLERK

Nos. 510 and 511

In the Supreme Court of the United States

OCTOBER TERM, 1929

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.

v.

SWANSON CHEMICAL CORPORATION

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 510

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR for Eastern Pennsylvania, et al.

v.

SWANSON CHEMICAL CORPORATION

No. 511

JAMES M. DORAN, PROHIBITION COMMISSIONER OF the United States, et al.

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACturing and Chemical Company

---

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General moves this Court to advance the above entitled causes for hearing with cases Nos. 443, 444, and 445, *Maurice Campbell et al.* v. *Galeno Chemical Company, Inc., et al.*; *Maurice Campbell et al.* v. *D. P. Paul and Company, Inc.*; and *Maurice Campbell et al.* v. *W. H. Long & Company, Inc.*, now on the docket of this Court.

95830—30

Numbers 510 and 511, now sought to be advanced, are before the Court on certificates from the United States Circuit Court of Appeals for the Third Circuit. Numbers 443, 444, and 445 come from the Circuit Court of Appeals for the Second Circuit on writs of certiorari granted on the application of the Government on December 2, 1929.

These cases involve a construction of various sections of Titles II and III of the National Prohibition Act, c. 85, 41 Stat. 305 (U. S. C., Title 27), in so far as they relate to the issuance and revocation of permits authorizing the use of whiskey in the manufacture of medicinal preparations, the use of alcohol in the manufacture of denatured alcohol, and the use of specially denatured alcohol in the manufacture of toilet articles, the principal questions presented being whether the administrative officers have authority under the Act to issue such permits for a period of indefinite duration, and whether permits issued for an indefinite period may, by general regulations subsequently issued, be terminated on a day certain.

As the questions involved in all these cases are practically the same, the cases may conveniently be argued together and disposed of at the same time. Therefore, this motion is presented.

Opposing counsel concur.

Respectfully submitted.

CHARLES E. HUGHES, Jr.
Solicitor General.

FEBRUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Nos. 510, 511

In the Supreme Court of the United States

OCTOBER TERM, 1929

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.

v.

SWANSON CHEMICAL CORPORATION

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR APPELLANTS BELOW

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 510

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR for Eastern Pennsylvania, et al.

v.

SWANSON CHEMICAL CORPORATION

No. 511

JAMES M. DORAN, PROHIBITION COMMISSIONER OF the United States, et al.

v.

MARTIN H. CASPER, TRADING AS DELMAR Manufacturing and Chemical Company

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR APPELLANTS BELOW

OPINIONS BELOW

The opinion of the District Court in No. 510 is not reported. A copy thereof will be found in an appendix to this brief (p. 25).

The opinion of the District Court in No. 511 is reported in 30 F. (2d) 400.

JURISDICTION

These cases are here on certificates under Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Case No. 510

In No. 510 the Circuit Court of Appeals certifies the following questions:

1. Is denatured alcohol, during its manufacture and preparation for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

If the answer to this question be in the negative, the court asks:

2. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to operate a denaturing plant, i. e., to use alcohol in the manufacture of denatured alcohol?

If the answer to the first question be in the negative and the answer to the second be in the affirmative, then the court asks:

3. Does a provision in a permit that it shall be in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for viola-

tion of the National Prohibition Act or regulations made pursuant thereto," comply with the above-mentioned requirement of Section 6 of Title II of the National Prohibition Act, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the first question be answered in the negative and if the second and third questions be answered in the affirmative, then the court further asks:

4. May a permit to operate a denaturing plant, which permit provides that it shall be in force "until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

This certificate presents the same questions as those involved in *Campbell et al.* v. *W. H. Long & Co., Inc.*, No. 445, now pending before this Court.

Case No. 511

In No. 511 the questions certified are as follows:

1. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to use specially denatured alcohol?

If the answer to this question be in the affirmative, the court asks:

2. Does a provision in a permit that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the National Prohibition Act or regulations made pursuant thereto" comply with the aforesaid requirement of Section 6, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the answer to the first question be in the negative, or if the answer to the second be in the affirmative, than the court asks:

3. May a permit to use specially denatured alcohol in the manufacture of toilet preparations, which permit provides that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the National Prohibition Act or the regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions and regulations involved in No. 511 are set forth in the appendix hereto (pp. 19–28). The statutory provisions and the regulations, together with a history thereof, involved in No. 510 are set forth in an appendix to Government's brief in Nos. 443, 444, and 445.

STATEMENT

Case No. 510

In No. 510 the Circuit Court of Appeals sets forth the following facts in its certificate:

On October 7, 1924, a permit authorizing the operation of a denaturing plant, the purchase and receipt of pure alcohol thereat, the denaturing thereof, and the removal therefrom of the denatured alcohol was issued to Swanson Chemical Corporation. The permit provided that it should be in effect " * * * from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 95 of Regulations 3 provided that all permits to operate denaturing plants, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to Article 95 the permittee, saving all rights it might have under its original permit, on August 14, 1928, filed an application for renewal. Following an investigation the Prohibition Administrator disapproved the application on the grounds that the applicant was not a fit person to be entrusted with a permit, that it had violated the terms of the National Prohibition Act, that it had sold the alcohol denatured by it under circumstances from which it or its officers might reasonably deduce the intention

of the purchaser to use the same for beverage purposes, and that it had assisted in the diversion of alcohol for beverage purposes. The permittee was advised that it might apply for a hearing upon its application for a renewal of its permit, but it refused to do so.

A bill in equity was thereupon filed by the permittee, Swanson Chemical Corporation, in the District Court for the Eastern District of Pennsylvania, asking for an injunction restraining the administrative officers from interfering with the carrying on of the business authorized by the terms of the original permit. An injunction was issued, and the defendants appealed.

It appears from the foregoing statement that the facts, as well as the questions of law, involved in this case are in all material respects the same as those in No. 445, now before this Court.

Case No. 511

In No. 511 the facts appearing in the certificate are as follows:

On March 23, 1923, a permit authorizing the use of specially denatured alcohol in the manufacture of toilet preparations was issued to Martin H. Casper. The permit provided that it "shall be in effect from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 113 of Regulations 3 provided that all permits of the class issued to Casper, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to Article 113, Casper, on August 28, 1928, filed an application for a renewal of his permit. Following an investigation the Prohibition Administrator notified Casper that his application had been disapproved on the grounds that he had not exercised his permit privileges in good faith and was not a fit person to be entrusted therewith. The permittee was advised that he might apply for a hearing upon his application for a renewal of his permit, but he refused to do so.

Casper thereupon filed a bill in equity in the District Court for the Eastern District of Pennsylvania asking for an injunction restraining the administrative officers from interfering with his permit privileges "unless and until the same shall have been revoked * * * pursuant to citation duly issued and hearing had thereon." An injunction was issued and the defendants appealed.

SUMMARY OF ARGUMENT

The facts and questions of law presented in No. 510 are substantially the same as those now before the Court in No. 445, *Maurice Campbell, etc.*, v. *W. H. Long & Co.*, and this Court's answers to the questions certified herein should be governed by its decision in that case.

No. 511 involves a permit to use specially denatured alcohol. Such a permit is to be distinguished from a permit to use liquor. The manufacture and use of liquor is governed by the statutory permit system. The *manufacture* of denatured alcohol requires the *use of alcohol* and is therefore also governed by the statutory permit system. Denatured alcohol, however, after having been manufactured and prepared for the market (for use) is expressly excluded from the provisions of the National Prohibition Act and is not to be treated as liquor. The use of denatured alcohol, and its alcoholic content, tax free, is controlled entirely by regulations. Permits may or may not be required. Having the authority to require permits, the administrative officers have the authority to provide for their revocation. Revocations are governed by regulations, and not by statute. Section 9 of Title II relates to the revocation of statutory permits. It has no relation to permits required solely by regulations. The power to issue regulations includes the power to repeal, amend, or modify such regulations. The promulgation of Article 113 of Regulations 3 was a valid exercise of that power.

If, however, it be held that Section 9 of Title II applies to the revocation of a permit to use denatured alcohol, Section 6 of Title II likewise has application. If Sections 6 and 9 have application the decision herein should be controlled by the decision in Nos. 443, 444, and 445, now before the Court.

ARGUMENT

I

THE ANSWERS TO THE QUESTIONS CERTIFIED IN NO. 510 SHOULD BE GOVERNED BY THE DECISION IN NO. 445 NOW BEFORE THE COURT

In No. 510 the Swanson Chemical Corporation held a permit to use alcohol in the manufacture of denatured alcohol. A like permit was held by W. H. Long & Co. in case No. 445, now before the Court on writ of certiorari granted December 2, 1929, and to be heard with Nos. 443 and 444, also involving permit questions. The facts in this case are substantially the same and the questions of law involved identical with those in No. 445. As these questions have been fully argued in the Government's brief on the merits in the above cases it is deemed unnecessary to repeat that argument here. The Government, therefore, refers to and adopts as its argument in this case the argument presented in those cases. It is submitted that the decision of the Court in No. 445 should control the answers to the questions certified in this case.

II

AFTER HAVING BEEN MANUFACTURED AND PREPARED FOR THE MARKET DENATURED ALCOHOL IS NOT AN INTOXICATING LIQUOR. ITS USE IS GOVERNED EXCLUSIVELY BY REGULATIONS

Number 511 involves a permit authorizing the use of specially denatured alcohol in the manufacture of toilet preparations. Obviously such a permit is not a permit authorizing the manufacture of liquor, and therefore the provision in Section 6, Title II, of the

National Prohibition Act, which directs that "all permits to manufacture * * * liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof" does not apply.

The preliminary question presented is whether the provision in Section 6 which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, applies to a permit to use specially denatured alcohol. If this provision of Section 6 applies, and the permit here involved is a "statutory" permit, it follows that the effect of Section 9 of Title II should be considered, and hence the answer to questions 2 and 3 herein would be governed by the answers to questions 3 and 4 in case Number 510.

But it is submitted that a permit to use denatured alcohol is not a statutory permit, that its issuance and revocation are governed entirely by regulations, and hence that Sections 6 and 9 of Title II have no application to the issuance or revocation of such a permit. If this view is sound, it follows that Section 9 is not a limitation upon the general powers of the administrative officers to terminate such permits unlimited in time by general regulations. The question thus presented is of great importance to the administrative officers in promulgating regulations governing the use of specially denatured alcohol, irrespective of the action taken in Numbers 443, 444, 445, and 510.

Section 600 of the Revenue Act of 1918, as amended by Section 900 of the Revenue Act of 1926, c. 27, 44

Stat. 9, 104 (U. S. C. App., Title 26, Sec. 245) places a tax on each proof gallon, or wine gallon when below proof, of distilled spirits manufactured in the United States.

Section 10, Title III, of the National Prohibition Act makes provision for the withdrawal and use of alcohol tax free in the manufacture of denatured alcohol. It further provides that "Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export." The provisions of Sections 10 and 11 of Title III are very similar to those contained in the Act of October 3, 1913, c. 16, Section IV, N, Subsec., 2, 38 Stat. 114, 199 (U. S. C., Title 26, Sec. 487), providing for the manufacture of alcohol free of tax for denaturation, the establishment of denaturing plants and the transfer thereto of alcohol, tax free, for denaturation, under the supervision of the Commissioner of Internal Revenue. This Act was an enlargement and continuation of the policy adopted by the Act of June 7, 1906, c. 3047, 34 Stat. 217 (U. S. C., Title 26, Secs. 481–486). It is clear that in enacting Sections 10 and 11 of Title III Congress intended to continue the policy adopted by these statutes.

In Section 4 of Title II it is provided that "after having been manufactured and prepared for the market" "denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force" shall not "be subject to the provisions of this Act." In explanation of this pro-

vision the Committee on Judiciary of the House in its report on this section (Report No. 91, 66th Cong., 1st Sess., H. R. Vol. 1) said:

> Section 4 of Title II makes provision for medicines, toilet articles, and flavoring extracts. The restrictions placed on these are less strict than like restrictions in many of our States, and are believed to be as liberal as it is safe to make them. *No doubt the present policy pursued by the Commissioner of Internal Revenue with regard to these preparations will be continued. We are assured that there is nothing in the restrictions contained in this bill that will necessitate a change in that policy, and it is believed that the restriction should not be made less stringent.* (Italics ours.)

The provisions of Section 4 and the report of the Committee indicate that it was intended that the use of denatured alcohol should in the future, as in the past, be controlled entirely by regulation free of statutory restrictions.

Under the Acts of 1906 and 1913, *supra*, the method of controlling the use of denatured alcohol so as to protect the revenue and prevent the diversion of the alcohol to illegal purposes was left entirely to the discretion of the administrative officers. Under those Acts Regulations 30, Revised, United States Internal Revenue, effective October 12, 1917, were promulgated. Under Regulations 30, those using *completely* denatured alcohol were not required to pro-

cure permits (Articles 60, 61, 80); those using specially denatured alcohol were. (Articles 77–90.) Permits to use specially denatured alcohol were issued to those in whom the Department had confidence. (Article 79.) Permits issued were limited in amounts and expired when the amounts specified had been withdrawn. Provision was made for renewal of such permits. (Article 79b.)

We submit that it was clearly the intention of Congress in enacting the National Prohibition Act to continue the policy of regulating the use of denatured alcohol by regulations and to control the use of such alcohol by flexible regulations which could be made adaptable to constantly changing conditions and the rapid development of new chemical processes. It will be observed that under Section 10 of Title III alcohol may be procured tax free only under regulations prescribed by the administrative officers. Section 13 of Title III directs the Commissioner to issue regulations "from time to time * * * which may be *necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses,* * * *." (Italics ours.) A regulation issued under this section has the force and effect of law. *Selzman* v. *United States*, 268 U. S. 466.

At the present time, no permit is required as a condition to one's right to procure completely denatured alcohol. (Article 88, Regulations 3, Revised, Treasury Dept., Bureau of Prohibition, effective October 1, 1927.) The appellee holds a permit

to use specially denatured alcohol. Such a permit is required by the provisions of Articles 88, 112 and 113 of Regulations 3. The statute makes no distinction between completely denatured alcohol and specially denatured alcohol. That the administrative officers have authority to authorize the use of completely denatured alcohol without a permit will hardly be questioned. If they may permit such use of completely denatured alcohol, they could likewise, so far as the statute is concerned, authorize such use of specially denatured alcohol, if in their discretion they determined that no permit was necessary, advisable or proper to secure the revenue or to prevent the diversion of such alcohol to illegal uses.

No one can obtain a vested right to secure alcohol tax free. See *Dunlap* v. *United States*, 173 U. S. 65. Nor can one obtain a vested right to the use of alcohol. See *Mugler* v. *Kansas*, 123 U. S. 623; *Everard's Breweries* v. *Day*, 265 U. S. 545. If, therefore, a method of denaturation should be discovered which would produce a denatured alcohol as fully denatured as that now classified as completely denatured alcohol and yet be adaptable to the uses for which specially denatured alcohol is now authorized, the administrative officers could, under the provisions of Sections 10 and 13, decide that the requirement to secure permits to use specially denatured alcohol was no longer necessary. The effect of such action would be to wipe out all existing permits. They would become a nullity. If thereafter a method

of reclaiming alcohol so denatured were to be discovered, the administrative officers could again require permits to use specially denatured alcohol.

If new processes of reclaiming denatured alcohol should make it impracticable at any time for the administrative officers to protect the revenue and prevent diversion under the regulations then in force, such officers could abolish the regulations and with them the permits outstanding, and require new permits to meet the changed conditions. These are matters falling within the administrative discretion of the officers charged with the enforcement of the Act, and no recourse to the courts could be had. (*Williamsport Co.* v. *United States*, 277 U. S. 551, 562; *United States* v. *Williams*, 278 U. S. 255, 257–258; *Dunlap* v. *United States*, 173 U. S. 65.)

Likewise, the administrative officers, having the power under the provisions of Section 10 to prescribe the denaturants which shall be added to alcohol in the manufacture of denatured alcohol, may at any time, in order to meet new conditions, change the ingredients of specially denatured alcohol and thereby render it unfit for some of the uses to which it is now adaptable.

If the administrative officers have the foregoing power, then it is manifest, we submit, that the use of specially denatured alcohol is controlled entirely and exclusively by regulations, and hence that Section 9, Title II, is in no sense a limitation upon the powers of such officers to terminate permits by general regu-

lation. The general term "any person who has a permit," as used in Section 9 of Title II, must be limited to those who come under the statutory permit system. See *United States* v. *Katz* (271 U. S. 354, 361–362).

It should be noted that the statute confers a limited right to use alcohol for certain purposes. It gives no right to use any particular kind of denatured alcohol or to secure the alcohol tax free.

It is accordingly submitted that aside from and in addition to the questions presented and considered in our brief in cases Nos. 443, 444, and 445, the administrative officers have the power under the statute to permit or preclude the use of denatured alcohol manufactured according to specified formulae; to change those formulae; to require permits to use denatured alcohol; to dispense with those requirements, and to terminate such permits by general regulations affecting all of a given class. If this be true, it is manifest that Article 113 of Regulations 3 is a valid regulation, and that appellee Casper's permit terminated on December 31, 1928, as the regulation provided. The third question certified should, therefore, be answered in the affirmative.

But if it be held that Section 9 of Title II applies to the revocation of a permit to use denatured alcohol, then Section 6 of Title II likewise applies. If Sections 6 and 9 apply, then the decision herein should follow the decision of the Court in Nos. 443, 444, and 445.

CONCLUSION

The questions certified in No. 510 should be answered as follows:

(1) The first, second, and fourth questions should be answered in the affirmative.

(2) The third question should be answered in the negative.

The questions certified in No. 511 should be answered as follows:

(1) The third question should be answered in the affirmative.

(2) If the third question be answered in the affirmative, the first and second questions need not be answered. If, however, the third question be answered in the negative, then the first question should be answered in the affirmative, and the second in the negative.

Respectfully submitted.

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APRIL, 1930.

APPENDIX

The National Prohibition Act, c. 85, 41 Stat. 305:

TITLE II

SEC. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * *

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. * * * (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of

this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

* * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor * * *. (U. S. C., Title 27, Sec. 13.)

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so

correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in Section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C. Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

TITLE III

SEC. 10. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is

authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export. * * * (U. S. C., Title 27, Sec. 80.)

SEC. 11. Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

* * * * *

But any person permitted to obtain alcohol tax free * * * shall first apply for and secure a permit to purchase the same and give the bonds prescribed under title II of this Act * * *. (U. S. C., Title 27, Sec. 81.)

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of * * * denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. (U. S. C., Title 27, Sec. 83.)

Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

SEC. 10. (*l*) *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * *.

Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

ART. 113. * * * Permits to use specially denatured alcohol in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and, if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

In the District Court of the United States for the Eastern District of Pennsylvania

Sitting in equity

No. 4895. December Term, 1928. Bill for Review

SWANSON CHEMICAL CORPORATION

v.

JAMES M. DORAN, ET AL.

OPINION

Sur Trial Hearing on Pleadings and Proofs

DICKINSON, *J.*: This case began as a motion for a preliminary injunction. The hearing was by stipulation expanded to one on final decree. The underlying question is that which, so far as this Court is concerned, has been answered in the case of *Del Mar Manufacturing and Chemical Company* v. *Doran, et al.*, which was heard at the same time as the instant case. The defendants differentiate this from the *Del Mar case* in that the plaintiff here holds a permit not for an alcoholic nonbeverage product but a "liquor" permit in that it may sell either or both alcohol or alcohol as a denatured product. There is, of course, a difference in fact between the manufacture of an alcoholic nonpotable product, in the manufacture of which denatured alcohol is an ingredient, and a manufacture of denatured alcohol itself. There would not seem, however, to be any difference in the permit classification because both are listed among "articles" enumerated in Section 4 of Title II of the National Prohibition Act.

The two classes of products, if they may be called such, would thus seem to have the like permit. A

differentiation, it is true, is made between the first four "articles" and the remaining two, but this differentiation is for a wholly different purpose than that of permit regulation. It is likewise true that this differentiation is based upon the fact difference that the "articles" enumerated in the first four classifications may readily be made potable. The truth remains, however, that a manufacturer of denatured alcohol and a manufacturer of flavoring extracts have the same permit rights under Section 4 of the Act.

The defendants' answer to this is, as we understand their position, "that a permit to operate the denaturing plant carries with it the right to buy and sell ethyl alcohol and that the defendant (evidently intended for plaintiff) has continually bought and sold ethyl alcohol under and by virtue of its permit."

We are constrained to confess that we do not understand this branch of the defense. Its position at the tail end of the answer gives the impression of the afterthought of a mere make weight comment. The real defense is that in the view of the defendants they may impose the time limit duration of a year upon all permits to produce the "articles" enumerated in Section 4.

This very question would seem to be the same sought to be raised on the motion for a preliminary injunction disposed of in the decree of this Court under date of February 18th, 1926. It is true that the defendants then conceded that upon the fact merits of the application for a permit the plaintiff had the right to one and that a decree requiring the permit to issue should properly be entered. They asked the Court to pass upon the abstract power of the Commissioner to adopt a regulation limiting per-

nits in such cases to a year. It is likewise true that the Court refused to pass upon this question because it did not arise in the case but the question would seem to be the same, and we are unable to discover in the answer anything more than the raising of the very question which has been ruled in the *Del Mar case*. It is always helpful in any discussion to have a frank avowal of what the real question under discussion is.

In the *Ma-King* and other cases the Courts have ruled in practical effect that on applications for original permits the Commissioner is called upon to exercise his executive or administrative judgment of whether a permit should issue and upon the question of issue the Courts have granted him what is practically the right to exercise his discretionary judgment. After, however, a permit had been granted the Commissioner can revoke it only in the manner prescribed by the Act of Congress and the judgment there exercised is not an executive or administrative judgment but is a judicial judgment, the basis of which is a fact finding. The defendants are strongly impressed with the value to them of the lawful power to exercise at least once a year an executive or administrative control over permits so that they may escape the need to resort to a judicial fact finding. This is the very power, however, which we have held the defendants do not possess. If the permit here is one to manufacture or sell "liquor," no regulation limiting its operation to a year is needed, because Section 6 expressly so limits it by law.

The only question before us thus becomes whether the permit in question is the one permit or the other. This is in one view a question of law and in another view a question of fact. We assume the stipulation

at Bar to include that the Court is to determine the character of the permit from the records which are before the Court. We begin with the application under date of January 15, 1924, which is an application for a permit to operate a denaturing plant under the provisions of Title III of the National Prohibition Act. This is followed by the issuance of a permit under date of October 7th, 1924, which authorized the operation of a denaturing plant, and incidentally that it should continue until revoked in accordance with the law.

The ruling made is that the permit in question, so far as the rights of the permittee are concerned, is in the same class with the permits granted to manufacturers of the other "articles" enumerated in Section 4, and that in consequence the decree prayed for should be granted.

A formal decree is filed herewith.

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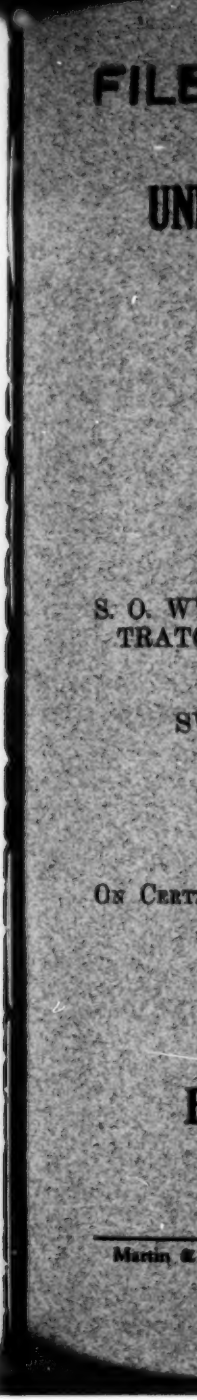
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APR 18
CHARLES ELMO

IN THE

UNITED STATES SUPREME COURT

October Term, 1929.

No. 510.

WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, *et al.*

v.

SWANSON CHEMICAL CORPORATION.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Appellee Below

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ARGUMENT:

I. During its manufacture and preparation for the market "denatured alcohol" is not "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act 4

II. A provision in a permit authorizing the operation of a denaturing plant that the permit will be in effect "until surrendered by the holder or cancelled by the Commissioner for violation of the National Prohibition Act or regulations made pursuant thereto," is a valid provision and satisfies the requirements of Section 6, Title II, requiring that all permits shall designate the time when the acts thereunder may be performed 8

III. A permit to operate a denaturing plant which provides that it shall be in force "until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," cannot be terminated by a general regulation providing that all such permits shall expire on a date named 9

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IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1929.

No. 510.

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, *et al.*,
v.
SWANSON CHEMICAL CORPORATION.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE BELOW.

OPINION BELOW.

The opinion of the District Court is not reported. A copy thereof will be found in an appendix to this brief (p. 15).

JURISDICTION.

This case is here on certificate under Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

In this case the Circuit Court of Appeals certifies the following questions:

1. Is denatured alcohol, during its manufacture and preparation for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

If the answer to this question be in the negative, the Court asks:

2. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to operate a denaturing plant, *i.e.*, to use alcohol in the manufacture of denatured alcohol?

If the answer to the first question be in the negative and the answer to the second be in the affirmative, then the Court asks:

3. Does a provision in a permit that it shall be in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," comply with the above-mentioned requirement of Section 6 of Title II of the National Prohibition Act, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the first question be answered in the negative and if the second and third questions be answered in the affirmative, then the Court further asks:

4. May a permit to operate a denaturing plant, which permit provides that it shall be in force "until surrendered by the holder or canceled by the Commissioner of Internal

Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

STATUTES INVOLVED.

The statutory provisions and the regulations, together with a history thereof, involved in this case, are set forth in an appendix to this brief (pp. 12-15).

SUMMARY OF ARGUMENT.

Permits to manufacture denatured alcohol are not permits to manufacture "liquor" within the meaning of Section 1 of Title II of the National Prohibition Act.

It necessarily follows that permits to manufacture denatured alcohol may be issued for a period longer than one year because the limitation provided in Section 6 of Title II of the National Prohibition Act that certain permits may be issued for one year applies to liquor permits only. The obtaining of "liquor" to be used in the manufacture of denatured alcohol is covered by the issuance of permits to purchase, as provided for in Section 6 of Title II of the National Prohibition Act. These purchase permits, as a matter of law, expire thirty days after the date of their issuance.

A provision in a permit to operate a denaturing plant to the effect that the permit shall be in force "until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," satisfies the requirements of Section 6, Title II, which provides that "every permit shall designate and limit the acts that are permitted and the time when and place where such acts may be performed."

A permit for the manufacture of denatured alcohol, which authorizes the operation of the denaturing plant "until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," may not be terminated by a general regulation providing that all such permits shall expire on a date named, because Section 9 of Title II of the National Prohibition Act provides the procedure under which permits may be terminated.

ARGUMENT.

I.

DURING ITS MANUFACTURE AND PREPARATION FOR THE MARKET "DENATURED ALCOHOL" IS NOT "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE NATIONAL PROHIBITION ACT.

Section 1 of Title II of the National Prohibition Act defines "liquor," or the phrase "intoxicating liquor," to include all alcoholic compounds, by whatever name called, containing one-half of one per cent or more of alcohol by volume which are "fit for use for beverage purposes."

The position taken by the appellants below is that the phrase "fit for use for beverage purposes" not only includes compounds which can immediately be used as a beverage, but all other compounds which may be made fit for beverage purposes by some manipulation after preparation for the market.

From the reading of Section 4 of Title II of the National Prohibition Act, it must be concluded that the position taken by the appellants below is not sound.

First of all, we find that denatured alcohol is referred to in said Section as an "article" and not as "liquor" or "intoxicating liquor." If Congress had intended that de-

natured alcohol, or any other compound containing one-half of one per cent or more of alcohol by volume, which is unfit for beverage purposes, should come within the definition of "liquor" as defined in Section 1 of Title II of the National Prohibition Act, it would not have used the word "article" in said Section 4 of Title II of the Act. Throughout the entire Act it may be noted that Congress carefully used the word "liquor" only when it intended to refer to such products as are fit for immediate beverage purposes. This is borne out by referring to Section 6 of Title II, where it is provided as follows:

> "All permits to manufacture, prescribe, sell or transport liquor may be issued for one year and shall expire on the 31st day of December next succeeding the issuance thereof * * *"

and then in the same section it is further provided as follows:

> "In the event of the refusal by the Commissioner of *any application for a permit,* (our italics) the applicant may have a review of his decision before a Court of Equity in the manner provided in Section 5 hereof."

It is to be noted that in the first instance "liquor" permits are referred to and in the second instance applications for any permits are referred to. The reason for this is that Congress clearly intended that liquor permits should expire annually, and yet it intended that the applicant for any permit should have the right to a review of the decision made by the Commissioner, regardless of whether the application is for a liquor permit or for a permit to manufacture any of the articles enumerated in Section 4 of Title II of the National Prohibition Act.

See *Higgins v. Foster,* 12 F. (2d) 646.

If the argument of appellants below is tenable, then it would not have been necessary for Congress to have specifically mentioned in some of the sub-divisions of Section 4 of Title II of the National Prohibition Act that the products therein referred to must be unfit for use for beverage

purposes. For instance, paragraph C of Section 4, provides that:

> "Patented, patent and proprietary medicines that are *unfit for use for beverage purposes* (our italics) after having been manufactured and prepared for the market shall not be subject to the provisions of the Act."

yet further on in the same section Congress provided that

> "Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of one per centum of alcohol by volume in which any extract, syrup or other article is used as an ingredient, shall be subject to the penalties provided in Section 29 of this Title * * * "

It can, therefore, be readily seen that although the articles which are mentioned in sub-divisions b, c and d of Section 4, Title II, of the Act, can only be manufactured on condition that they are unfit for use for beverage purposes, and therefore could not possibly come within the definition of the word "liquor" in Section 1 of Title II, yet Congress anticipated that some of these articles likely could be made fit for beverage purposes, or might be even used in their original state for beverage purposes, because a penalty is provided for such use in the section itself.

Certainly the appellants below could not argue that any of the articles mentioned in sub-divisions b, c and d could be classed as "liquor," as defined in Section 1 of Title II, yet, as heretofore stated, Congress clearly anticipated that these very articles which by the limitations placed upon them could not possibly be classed as "liquor" within the meaning of the Act, could, after being prepared for the market, be used, either after manipulation or in their actual state, as beverages.

The contention of the appellants below that any "article" mentioned in Section 4 of Title II of the Act, which could, after manufacture, be used as a beverage after some manipulation, would bring the article within the meaning of the word "liquor" as defined in Section 1, Title II, of the Act, must fall.

The appellants below further take the position that the "articles" mentioned in Section 4 are not excluded from the provisions of the Act at the time of manufacture, and that they remain within the Act until "prepared for the market." In a sense this is clearly true. It is true that alcohol must be purchased and possessed by a manufacturer of denatured alcohol in order to obtain the same for denaturation, but Section 6 of the Title II does not provide that permits to purchase shall expire on the 31st day of December next succeeding the issuance thereof. On the contrary, with regard to permits to purchase "liquor," it provides as follows:

> "That permits to purchase liquor for the purpose of manufacturing or selling, as provided in this Act, shall not be in force to exceed ninety days from the date of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days."

Appellants below overlook the fact that before alcohol may be purchased by the appellee below for the purpose of denaturation, applications for permits to purchase must be made and that these permits expire at the end of thirty days from the date of their issuance. These purchase permits are unquestionably "liquor" permits as defined in Section 1, Title II, of the Act. It can, therefore, be readily seen that the handling of the alcohol prior to its denaturation is covered by these permits to purchase.

Further proof of the fact that Congress intended that the "articles" mentioned in Section 4 of Title II should not be classed as "liquor" is evidenced by the fact that Section 6 of Title II provides, *inter alia*, as follows:

> "Every permit shall be in writing, dated when issued, and signed by the Commissioner or his author-

ized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed."

It has already been noted that Section 6 of Title II prescribes the time limit for which so-called "liquor" permits may be issued. Why then should Congress later in the same section provide that, "*every permit* (our italics) shall designate and limit the time"? This further clearly shows that Congress intended that permits for the manufacture of "articles" mentioned in Section 4 of Title II might be issued for a longer period than a year.

II.

A PROVISION IN A PERMIT AUTHORIZING THE OPERATION OF A DENATURING PLANT THAT THE PERMIT WILL BE IN EFFECT "UNTIL SURRENDERED BY THE HOLDER OR CANCELLED BY THE COMMISSIONER FOR VIOLATION OF THE NATIONAL PROHIBITION ACT OR REGULATIONS MADE PURSUANT THERETO" IS A VALID PROVISION AND SATISFIES THE REQUIREMENTS OF SECTION 6, TITLE II, REQUIRING THAT ALL PERMITS SHALL DESIGNATE THE TIME WHEN THE ACTS THEREUNDER MAY BE PERFORMED.

Wherever Congress intended to fix a measured duration of a permit it did so expressly. By referring to Section 6 of Title II, we find that all permits except those for the manufacture of the "articles" mentioned in Section 4 of Title II are specifically limited. If Congress had intended that permits for the manufacture of the "articles" mentioned in Section 4 of Title II should be specifically limited as to time it would have expressly provided therefor as it did with regard to all other permits.

It is submitted that the provision in the permit itself which provides that it shall be in effect "until surrendered

or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," answers the requirements of the Act.

See *Lyon Laboratories, Inc., et al., v. Campbell,* 34 F. (2d) 642.

III.

A PERMIT TO OPERATE A DENATURING PLANT WHICH PROVIDES THAT IT SHALL BE IN FORCE "UNTIL SURRENDERED BY THE HOLDER OR CANCELLED BY THE COMMISSIONER OF INTERNAL REVENUE FOR VIOLATION OF THE NATIONAL PROHIBITION ACT OR REGULATIONS MADE PURSUANT THERETO" CANNOT BE TERMINATED BY A GENERAL REGULATION PROVIDING THAT ALL SUCH PERMITS SHALL EXPIRE ON A DATE NAMED.

The regulation limiting the duration of permits for the manufacture and sale of "articles" enumerated in Section 4 of Title II of the National Prohibition Act when such permits have originally been issued to be held until surrendered or revoked for violation is in effect a revocation of such a permit without first proceeding as provided in Section 9 of Title II of the National Prohibition Act.

See *Weste v. Campbell,* 21 F. (2d) 771, wherein the Court said (page 771) as follows:

> "(1) My impression of the case is that the Prohibition Acts, The Volstead and its amendments (27 USCA) purport to contain reasonably complete provisions as to the regulative and administrative features of them, and that regulations promulgated by the Department under the authority of the law must, of course, conform to the general principle that they can enforce, explain, and apply the law; they can never modify or remake it, and must always be in conformity with it; that it appears from Section 9, Title II of the

Act (27 USCA 21), that permits were recognized as held under a qualified title, the fundamental basis of which was the good faith, the compliance by the permittee with the provisions of law controlling the disposition, the handling, and use of alcohol.

(2) Under that section provision is made for the revocation of a permit of any person who is found guilty of either wilfully violating any of the prohibition laws, or who has not in good faith conformed to the provisions of the Act; and that a reasonable construction of that section in accordance with the spirit, intent, and purpose of the Act would authorize a revocation without proof of a specific violation of a specific statute or regulation, where the proof established wilful connivance with or cooperation in a deliberate attempt to evade or violate a provision of the law, I have no doubt.

So construed, Section 9 is comprehensive enough to cover, and at the same time protect, every good faith and honest permittee, and to have stripped of protection any permittee who operates outside of the bona fides.

(3) That being so, I am of the opinion that a permit once granted cannot be revoked or suspended or nullified either temporarily or permanently without a substantial compliance with the provisions of Section 9, and that no regulation can be promulgated which would have such an effect."

See also *Higgins v. Foster*, 12 F. (2d) 646, wherein the Court said (page 648), as follows:

"As Section 9 of Title II prescribed that the delinquent must have 15 days' notice and be served with a statement of the facts on which he was to suffer revocation, it applied to the plaintiff, if we are right, and the regulation of November 14, 1925, denied him a right which the statute gave him. We need hardly add that this conclusion depends in no sense upon any vested right which he had in his permit, but only upon such limitations as were created by the statute itself.

While the case is entirely open on the merits to the Commissioner, and while we agree that there was ground for revocation, we do not see our way clear to affirm the defendant's action in the face of the method by which it was accomplished. The permit still remains in force, and the plaintiff is entitled under Section 9 to an injunction until it has been forfeited in due form of law."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the questions certified to this Honorable Court by the Circuit Court of Appeals should be answered in the following manner:

(1) The second and third questions should be answered in the affirmative.

(2) The first and fourth questions should be answered in the negative.

Respectfully submitted,

MICHAEL SERODY,
Attorney for Appellee below.

APPENDIX.

The National Prohibition Act, c. 85, 41 Stat. 305:

TITLE II.

Sec. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

Sec. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and syrups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, syrup or the articles named in paragraphs b, c and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, syrup, or other article is used as an ingredient, shall be subject to the penalties provided in Section 29 of this Title.

Sec. 6. No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *

All permits to manufacture, prescribe, sell or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: Provided, That the commissioner may without formal application or new bond extend any permit granted under this

Act or laws now in force after August 31 in any year to December 31 of the succeeding year: Provided further, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

Sec. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which

time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of wilfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SITTING IN EQUITY

No. 4895. December Term, 1928. Bill for Review.

SWANSON CHEMICAL CORPORATION
v.
JAMES M. DORAN, *et al.*

OPINION SUR TRIAL HEARING ON PLEADINGS AND PROOFS.

DICKINSON, J.:

This case began as a motion for a preliminary injunction. The hearing was by stipulation expanded to one on final decree. The underlying question is that which, so

far as this Court is concerned, has been answered in the case of Del Mar Manufacturing and Chemical Company v. Doran, *et al.*, which was heard at the same time as the instant case. The defendants differentiate this from the Del Mar case, in that the plaintiff here holds a permit, not for an alcoholic non-beverage product, but a "liquor" permit, in that it may sell either or both alcohol or alcohol as a denatured product. There is, of course, a difference in fact between the manufacture of an alcoholic non-potable product, in the manufacture of which denatured alcohol is an ingredient, and a manufacture of denatured alcohol itself. There would not seem, however, to be any difference in the permit classification because both are listed among "articles" enumerated in Section 4 of Title II of the National Prohibition Act.

The two classes of products, if they may be called such, would thus seem to have the like permit. A differentiation, it is true, is made between the first four "articles" and the remaining two, but this differentiation is for a wholly different purpose than that of permit regulation. It is likewise true that this differentiation is based upon the fact difference that the "articles" enumerated in the first four classifications may readily be made potable. The truth remains, however, that a manufacturer of denatured alcohol and a manufacturer of flavoring extracts have the same permit rights under Section 4 of the Act.

The defendants' answer to this is, as we understand their position, "that a permit to operate the denaturing plant carries with it the right to buy and sell ethyl alcohol and that the defendant (evidently intended for plaintiff) has continually bought and sold ethyl alcohol under and by virtue of its permit.

We are constrained to confess that we do not understand this branch of the defense. Its position at the tail end of the answer gives the impression of the afterthought of a mere make-weight comment. The real defense is that in the view of the defendants they may impose the time limit duration of a year upon all permits to produce the "articles" enumerated in Section 4.

This very question would seem to be the same sought

to be raised on the motion for a preliminary injunction disposed of in the decree of this Court under date of February 18, 1926. It is true that the defendants then conceded that upon the fact merits of the application for a permit the plaintiff had the right to one and that a decree requiring the permit to issue should properly be entered. They asked the Court to pass upon the abstract power of the Commissioner to adopt a regulation limiting permits in such cases to a year. It is likewise true that the Court refused to pass upon this question because it did not arise in the case, but the question would seem to be the same, and we are unable to discover in the answer anything more than the raising of the very question which has been ruled in the Del Mar case. It is always helpful in any discussion to have a frank avowal of what the real question under discussion is.

In the Ma-King and other cases the Courts have ruled in practical effect that on applications for original permits the Commissioner is called upon to exercise his executive or administrative judgment of whether a permit should issue, and upon the question of issue the Courts have granted him what is practically the right to exercise his discretionary judgment. After, however, a permit had been granted, the Commissioner can revoke it only in the manner prescribed by the Act of Congress, and the judgment there exercised is not an executive or administrative judgment, but is a judicial judgment, the basis of which is a fact finding. The defendants are strongly impressed with the value to them of the lawful power to exercise at least once a year an executive or administrative control over permits, so that they may escape the need to resort to a judicial fact finding. This is the very power, however, which we have held the defendants do not possess. If the permit here is one to manufacture or sell "liquor," no regulation limiting its operation to a year is needed, because Section 6 expressly so limits it by law.

The only question before us thus becomes whether the permit in question is the one permit or the other. This is in one view a question of law and in another view a question of fact. We assume the stipulation at bar to

include that the Court is to determine the character of the permit from the records which are before the Court. We begin with the application under date of January 15, 1924, which is an application for a permit to operate a denaturing plant under the provisions of Title III of the National Prohibition Act. This is followed by the issuance of a permit under date of October 7th, 1924, which authorized the operation of a denaturing plant, and incidentally, that it should continue until revoked in accordance with the law.

The ruling made is that the permit in question, so far as the rights of the permittee are concerned, is in the same class with the permits granted to manufacturers of the other "articles" enumerated in Section 4, and that, in consequence, the decree prayed for should be granted.

A formal decree is filed herewith.

FILE COPY

IN THE

Supreme Court of the United States

Nos. 510, 511. October Term, 1929.

S. O. WYNNE, Federal Prohibition Administrator for Eastern Pennsylvania, et al.,

v.

SWANSON CHEMICAL CORPORATION.

JAMES M. DORAN, Prohibition Commissioner of the United States, et al.,

v.

MARTIN H. CASPER, Trading as DELMAR MANUFACTURING AND CHEMICAL COMPANY.

On Certificates from the United States Circuit Court of Appeals for the Third Circuit.

Brief for Appellee Below.

PATRICK J. FRIEL,
Attorney for Appellee.

International, 236 Chestnut St., Philadelphia

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 510.

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.,

v.

SWANSON CHEMICAL CORPORATION.

No. 511.

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.,

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY.

On Certificates From the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLEE BELOW.

PRELIMINARY STATEMENT.

The question presented in this case differs somewhat from others of the several cases to be heard before this Honorable Court pursuant to certificates submitted by the Circuit Court of Appeals for the Third Circuit in that in this

particular case the appellee below had never issued to him a liquor permit as the term is defined in the National Prohibition Act, but had, on the contrary, a permit issued to manufacture an article which is specifically exempted from the operation of the Prohibition Act by the provisions of Section 4, Title II of said Act, and at no time did the appellee below ever have in his possession or authority to use anything but specially denatured alcohol which is a non-beverage, non-potable article.

Inasmuch as the question presented is somewhat novel and in view of the further fact that the companion cases to be heard have had in the preparation thereof, considerable attention given to the decided related cases, this argument will be addressed and confined solely to a differentiation between this particular class of permit and the other classes of permits and an attempt made to distinguish between them.

ARGUMENT.

The appellants in the brief submitted to the Court have phrased five questions as being for this Court to pass upon, none of which accurately present the question as decided by the District Court below. Therefore, the appellee restates the question, as he sees it, to be as follows:

> CAN THE COMMISSIONER OF INTERNAL REVENUE CANCEL A PERMIT REGULARLY ISSUED WITHOUT LIMITATION AS TO TIME THROUGH THE MEDIUM OF A REGULATION AND WITHOUT PROCEEDING ACCORDING TO THE PROCEDURE OUTLINED FOR REVOCATION OF PERMITS AS CONTAINED IN SECTION 9 OF TITLE II OF THE NATIONAL PROHIBITION ACT?

The Commissioner of Internal Revenue and his agents have been since 1924 attempting to secure the power to revoke by regulation, through the medium of a regulation requiring the so-called article permits to be annually renewable and the right to refuse such renewals, and thereby effect a revocation without proceeding in the form of a citation and hearing.

The question which accordingly arises from this situation has been repeatedly passed upon by the District Courts of the United States in practically every district and with the almost unanimous result that such powers were deemed by the courts as not having been vested in the Commissioner.

In order that the Court may get some idea of the overwhelming number of decisions on this point which have decided that the Commissioner has no such power, the Court is referred to the following reported cases.

Fred Feil Brewing Co. v. Doran, 2 Fed. (2) 879;
Stroh Products Co. v. Davis, 8 Fed. (2) 773;
Smith v. Foster, 15 Fed. (2) 115;
Gautieri v. Sheldon, 7 Fed. (2) 408;
Weste v. Campbell, 21 Fed. (2) 771;
Higgins v. Foster, 12 Fed. (2) 646;
Glenwood Industrial Distilling Co. v. Doran, 30 Fed. (2) 878;
Mascola v. Mellon, 25 Fed. (2) 173.

Not only have the foregoing cases been reported on this very point, but there have been in the various districts other cases unreported to a like effect and in the District of Columbia alone, there are to counsel's knowledge some twenty or more cases on the same point.

The Court is advised that the permits here in question are not liquor permits, in the strict sense of that term, nor are they beverage permits since the products dealt with by such permits are made from specially denatured alcohol

which is in itself non-potable and unfit for use for beverage purposes, and the articles themselves as well as the ingredients thereof are not subject to the operation of the National Prohibition Act because they are specifically exempted from such operation by the provisions of Section 4, Title II of the National Prohibition Act which provides as follows:

> Sec. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:
>
> (a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.
>
> (b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.
>
> (c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.
>
> (d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.
>
> (e) Flavoring extracts and sirups that are unfit for use for beverage purposes, or for intoxicating beverage purposes.
>
> (f) Vinegar and preserved sweet cider.
>
> A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the report specified in this Act and as directed of any liquor commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured there-

from. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this Title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup or beverage without making an application for, giving bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales.

The Court is particularly asked to note subdivisions (a) and (d) of said section for the reason that subdivision (a) exempts denatured alcohol which is in accordance with the interpretation of the Act not a potable beverage article, but which is the chief ingredient of the articles enumerated in subdivision (d) of said section and stress is laid upon this particular portion of the National Prohibition Act for the reason that it is immediately followed by Section 5 which deals with an abuse or misuse of the preparations

enumerated in Section 4 and wherein it is provided that should the Commissioner find that any of the articles therein enumerated do not correspond with the descriptions and limitations outlined, the Commissioner may by a citation proceedings, cite such person to appear and show cause why his permit to manufacture and sell such articles should not be revoked, in the event that it is determined upon analysis that same shall be dealt with as an intoxicating liquor. The very phraseology of the section quoted is sufficient to indicate that Congress intended a distinction between beverage and non-beverage products and the further fact that Congress devoted an entire Title, i. e. Title III of the National Prohibition Act to the subject of industrial alcohol and indicated its desire to "place the non-beverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible place of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes and other lawful products," is quite indicative of such intent. This provision is quoted as well for the purpose of showing the intent of Congress to deal liberally with industrial alcohol as for the purpose of comparing such expressions with that quoted by the appellants in Section 3 of Title II of the National Prohibition Act which the Court will note refers to the use of intoxicating liquor as a beverage.

Not only have the District Courts of the United States overwhelmingly refused to sanction the exercise of power in this respect as sought by the Commissioner but the United States Circuit Court of Appeals for the Second Circuit in the case of **Higgins v. Foster, 12 Fed. (2d) 648** has said:

> "We think that Section 6 of Title II has no relation to denatured alcohol and that there is therefore no statutory provision which sets a term to such permits,

whether they be assumed to be authorized by Section 4 of Title II or Section 13 of Title III under which Article 21 of Regulation 61 was promulgated by the Commissioner. Section 6 uses the word 'liquor' which is defined by Section 1 of Title II and which seems to us clearly to be confined to beverages. It is true that it uses the word, 'alcohol,' but that especially in its context precludes denatured alcohol which is not potable. Hence we think that the permit in its original form was not unlawful and that the regulation of November 14, 1925, did more than confine permits for denatured alcohol to the terms prescribed by statute."

and the Court further commenting upon the limitation of permits and procedure for cancellation thereof said:

"Again we do not think that by originally making the permit terminable by cancellation the commissioner could evade, or meant to evade, Section 9 of Title II assuming for the moment that that section applied to them. In effect it had as indefinite duration, and was subject only to such revocation as the law allowed. It did not lie within the power of the commissioner by phrasing the permit in the language chosen to escape any requirements of cancellation which the statute imposed."

and reasoning further, the Circuit Court of Appeals in that case held:

"Moreover, if Section 9 of Title II applies to permits for denatured alcohol, we cannot see that the commissioner under the guise of legislation may do in gross what he had no power to do in detail. If each holder of a permit was entitled to insist upon a hearing before revocation, it would as much take away his right so created to cancel along with his own the permits of all others similarly situated, as though the action had been directed towards him alone. No reason is suggested why it should be possible by so multiplying the wrong to give it a character of legality.

"THEREFORE the question comes to whether Section 9 of Title II applies to denatured alcohol. We thing that it does. It is clear that in spite of its head-

ing Title II covers more than potable intoxicants. Section 4 describes non-potable liquids exclusively with the exception of cider and especially mentioned denatured alcohol (sub. div. a). It provides for a permit to manufacture and in other ways regulates dealing in them. Section 5 concerns the products mentioned in Section 4 and prescribed the procedure to revoke permits granted under it, but it is limited to defects in the quality of the products themselves. But it is not to be supposed that Section 4 was the measure of the commissioner's power to proceed against holders of permits under Section 4. Other abuses were possible than defects in quality and might be equally intolerable or more so. On the other hand we should expect that the procedural protection given holders of permits by virtue of Section 5 would not be taken from them when charged with other abuses in the conduct of their business. In short, we should look for a provision beyond Section 5 under which such permits might be revoked, but without opening the door for arbitrary and unreviewable action."

However, the Commissioner is apparently not satisfied with the machinery set up in the Act for the purpose of revoking permits of those who have violated the terms of the regulations or permits, but he has in mind a more summary proceeding whereby, the holder of a permit, at the whim of the Commissioner might have his permit revoked, cancelled and terminated through the expediency of a refusal to extend it upon grounds which may be imaginary, trivial or even based upon personal malice. The procedure sought by the Commissioner as a method of revocation would deny the permittee a right to a hearing, upon such charges as the Commissioner might hold against him, and deny a fair trial of the respective merits of the Commissioner's position and that of the permittee. He would again depend upon the whim of the Commissioner as to whether or not he might have a hearing because the Act itself provides for no such procedure as a hearing upon a disapproved application. The only provision of the Act with reference

to a trial in the event of a refusal of an application by the Commissioner is contained in the last paragraph of Section 6 of Title II which is as follows:

> "In the event of the refusal by the Commissioner of any application for a permit, the applicant may have a review of the decision before a Court of Equity in which manner provided in Section 5 hereof."

and the manner provided in Section 5 with reference to review by Courts of Equity in connection with decisions of the Commissioner is as follows:

> "The manufacturer may by appropriate proceeding in a Court of Equity have the action of the Commissioner reviewed, and the Court may affirm, modify, or reverse the finding of the Commissioner as the facts and law of the case may warrant."

It will be noted, therefore, that nowhere in the Act is there any provision for a departmental hearing upon disapproved or refused applications and the practice of conducting such hearings on disapproved application is not a procedure provided for by law and therefore a right to which the permittee or applicant is entitled. It is simply an outgrowth of practice developed by expediency in connection with these cases and may be terminated by the Commissioner at any time without violation of the statutory requirements.

The law has, however, provided for the cancellation of permits in a definite form which is by way of citation upon charges and hearing thereon in accordance with the machinery outlined in Section 9 of the Act which method the Commissioner seeks to circumvent for reasons of his own and aspires to the position which would enable him to legislate by regulation.

The placing of regulatory power in any department of the Government or bureau thereof has inevitably led to the attempt to create laws by regulation and this evil as practiced by certain branches of the Government is often a

misuse of the power which it was intended to confer upon officials of the Government. They take the position that an approval of a regulation by the Secretary of the Treasury gives that regulation the force and effect of a constitutional enactment.

The procedure sought to be established by the Commissioner and his agents is without parallel in the attitude of the law toward other legitimate businesses, the implication being that every holder of an alcohol permit is a potential criminal and the aspersion necessarily casts an insult upon all the industrial and scientific users of alcohol in the country. Were the Commissioner to have his way he would doubtless hold that there is absolutely no need for the legitimate use of alcohol in any event and he would demand regulation upon regulation until he had reduced every bona fide holder of an alcohol permit to the level of a paroled convict. He believes the law should be made so that it would yield to the whim of the Commissioner as expressed in his regulation from time to time, but the Court can doubtless perceive that such a thing is obnoxious to our constitutional guaranties and as has been said in Courts in connection with the Commissioner's ambition in this respect—this is a Government of laws and not of men and that legal principles are not to be sacrificed to mere matters of expediency.

The intent of Congress that the use of industrial alcohol should be placed upon the highest possible plane of commercial efficiency is not consistent with the wishes of the Commissioner that he be permitted to harass, embarrass, hinder and delay the use of industrial alcohol as an ingredient and essential element to the many useful arts and industries and the fact that industrial alcohol is a non-potable, non-beverage article when acquired by permit holders for legal use in legitimate business is one of the reasons why Congress differentiated between industrial alcohol and liquor for intoxicating beverage purposes as defined in Section 1 of Title II.

It is argued that specially denatured and toilet preparations containing more than one-half of one per cent. of alcohol by volume are liquor within the meaning of Sections 1 and 6 of Title II. The most complete refutation of this argument is contained in the italics supplied by the appellants in their brief wherein they state that certain articles are within the definition of liquor and which are "fit for use for beverage purposes." Nowhere in their argument have they stated that the specially denatured alcohol or toilet preparations manufactured pursuant to the permit here involved are "fit for use for beverage purposes." The very fact that Section 4 of Title II after enumerating certain of the articles exempted therein from the Act was a clear expression of fact that they were deemed unfit for beverage purposes and they cannot, by regulation, be deemed to be within the purview of the Act relating to intoxicating liquor, nor can the Commissioner by regulation extend, modify, or circumvent the Act by placing them within the operation of the Act.

The second argument advanced by the appellants, which says, in effect, that if the articles enumerated are held not to be within the definition of liquor as provided for in Sections one and six of Title II, that there then exists no provision for the review of the Commissioner's decision in reference to permits for such articles, is sufficiently answered by the provisions of Section 9 of Title II which does not limit in terms the kind or type of permits, the machinery for the taking away of which is therein contained and we again refer to the case of **Higgins v. Foster, supra,** wherein the application of Section 9 to denatured alcohol permits was passed upon and in further commenting upon the application of Section 9 to industrial alcohol permits, the Circuit Court of Appeals for the Second Circuit in that case said:

> "The language of Section 9 of Title II seems to us to bear out this expectation. It is not, like Section 6 confined to 'liquor', but speaks generally of permits covering all cases where 'any person who has a permit

is not in good faith conforming to the provisions of the Act.' It is quite true that a defect in the product, covered by Section 5, would fall within the compass of this general language, but the procedure of that section was special and that fact accounts, we think, for its presence alongside of Section 9, and relieves us from the embarrassment of assuring that it was redundant. In short, Section 9 protected all holders of permits, whether for potable or non-potable intoxicants while Section 5 prescribed a particular procedure in the case of non-potable permits when the fault lay in the quality of the product."

The third argument advanced by the appellants is sufficiently answered by proper interpretation of Section 6 since Section 6 deals with liquor permits as distinguished from industrial alcohol permits and the Circuit Court of Appeals for the Second Circuit has held:

> "We think that Section 6 of Title II has no relation to denatured alcohol and that there is therefore no statutory provision which sets a term to such permits, whether they be assumed to be authorized by Section 4 of Title II or Section 13 of Title III."

which latter Section we have quoted in connection with the intent of the Congress to place the non-beverage alcohol industry upon the highest possible plane of commercial efficiency.

The fourth argument advanced by the appellants is an attack upon the provisions of their own interpretation of industrial alcohol permits, since the Department itself originally recognized the distinction between liquor permits and industrial alcohol permits, because since the inception of permit procedure the Department followed the provisions of Section 6 with reference to limitation of time on liquor permits and placed industrial alcohol permits in another category without limitation, said permits to be in effect until surrendered by the holder or *until cancelled by the Commissioner of Internal Revenue for violation of the pro-*

visions of Title III of the National Prohibition Act, and this distinction is now attacked by the appellants for the reason that it is not consistent with their original interpretation. They now contend that the Congress intended that every permit be specifically limited as to time, but they point out no reason why the Congress didn't say that such was their intent since the Congress did specifically limit the duration of liquor permits. The only reason which they can truthfully and honestly advance for proposing that such permits be limited is that they intend to make use of matters of expediency as a basis for circumventing the Act itself. Since the law provides for the taking away of a permit in accordance with well defined procedure for any violation of law or regulation, the Commissioner has within his power the machinery for terminating the permits of those who have not in good faith conformed to the provisions of law and regulations.

Their fifth argument dealing with the validity of Article 118 of Regulation No. 2 and Article 113 of Regulation No. 3 is premised upon the fact that both classes of permits are within the definition of Section 6 of Title II of the National Prohibition Act. We take the position that Article 113 of Regulation No. 3 is not valid as a method for the termination of an industrial alcohol permit since the question was passed upon by the Circuit Court of Appeals for the Second Circuit and a similar regulation involved which led to the action in that case.

The Commissioner seeks to impose his *ex parte* judgment, as to the fitness or unfitness of an applicant, as a basis for his regulation and his proposed action, but the Commissioner's conclusion that a permittee is either fit or unfit to be the holder of an industrial alcohol permit is one that must be premised upon such permittee's compliance or non-compliance with the terms of the law and regulations.

In the event that from a proper premise the Commissioner concludes that a certain permittee is not conforming

to the law and regulation, that contention may be tried through the medium of the procedure as outlined in Section 9 which says in part that if at any time the Commissioner has reason to believe that any person who has a permit is not in good faith conforming to the provisions of the Act, that the Commissioner or his agents shall immediately issue an order citing such person to appear before him to answer the charges upon which the Commissioner has concluded that such a person is not a fit one to hold a permit.

The law is mandatory that the Commissioner shall immediately cite and specifically limits the return for the trial on such charges to a period not less than fifteen days nor more than thirty days from the service of said charges upon the permittee indicating very plainly the necessity of prompt action by the Commissioner to the end that undesirable permittees may be eliminated through the medium of revocation proceedings.

Certainly the Commissioner has within his power the method and the machinery for the cancellation of permits which are being abused and he should be compelled to employ the machinery provided. If the charges which the Commissioner seeks to press against any given permittee are material or substantial he can in a lawful manner prevent a misuse or abuse of permit privileges and the situation would not be that in which the general public would have the economic life or death of their enterprises in the hands of a possible autocratic or bureaucratic official.

Respectfully submitted,

PATRICK J. FRIEL,
Attorney for Appellee.

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SUPREME COURT OF THE UNITED STATES.

Nos. 445, 510 and 511.—October Term, 1929.

Maurice Campbell, Federal Prohibition Administrator, et al., Petitioners, 445 *vs.* W. H. Long & Company, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
S. O. Wynne, Federal Prohibition Administrator, et al., 510 *vs.* Swanson Chemical Corporation.	On Certificates from the United States Circuit Court of Appeals for the Third Circuit.
James M. Doran, Prohibition Commissioner, 511 *vs.* Martin H. Casper.	

[May 26, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

These three cases deal with basic permits concerning denatured alcohol. They were argued together with Nos. 443 and 444, *Campbell* v. *Galeno Chemical Co., supra*, p. —, decided this day, and involve, in the main, the same questions.

In Nos. 445 and 510, the permits involved authorize the operation of denaturing plants, the purchase and receipt of alcohol thereat, and the removal therefrom of the denatured alcohol. In No. 511, the permit authorizes the use of specially denatured alcohol[1] in the

[1] "Completely denatured alcohol is alcohol which has been denatured by a limited number of fixed formulae, for sale to the general public with very little supervision. Specially denatured alcohol is alcohol which is not as completely denatured as the 'completely', and can only be obtained under a heavy bond for use in manufacturing processes in which the alcohol is always protected by the bond."—Treasury Dept., Internal Revenue Regulations 61, Jan. 31, 1926 (T. D. 2986), Art. 92. "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit its use in a greater number of specialized arts and industries than completely denatured alcohol." Regulations 61, revised July 1925, Art. 88.

manufacture of toilet preparations.[3] In each of the three cases the permit was issued prior to October 1, 1927, and was in accordance with the regulations in force at the date of issuance.[3] Each permit provides in terms that it shall be in force "from the date hereof until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the national prohibition act[4] or regulations made pursuant thereto."

While the permits of the several plaintiffs were still in force, the Treasury Department, Bureau of Prohibition, promulgated Regulations 3, effective October 1, 1927. Article 95 thereof provides that all basic permits theretofore issued to operate denaturing plants and manufacture denatured alcohol shall expire on December 31, 1928, unless renewed; and that thereafter only annual permits shall be issued. Article 113 makes the same provision for permits to use specially denatured alcohol in the manufacture of toilet and other preparations. The plaintiffs, insisting on the effectiveness of their original permits, filed applications for renewal, which were denied. These suits were then brought to enjoin interference with their permits otherwise than in accordance with the provisions of § 9 of the Act, considered in the *Galeno* case. In No. 445 an injunction was issued by the trial court; the decree was affirmed by the Circuit Court of Appeals for the Second Circuit (34 F. (2d) 645); and we granted certiorari (280 U. S. —). Injunctions were granted by the trial court also in Nos. 510 and 511 (30 F. (2d) 400)[5]; appeals were taken to the Circuit Court of Appeals for the Third Circuit; and these cases are here on certificates from that court.

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[2]As in Nos. 443 and 444, two permits are required from the plaintiffs in these cases. One, the basic permit conferring general authority to engage in the business; the other, a supplemental permit, issued from time to time, granting authority for specific withdrawals of alcohol or specially denatured alcohol. Only the basic permits are here involved.

[3]The first regulations promulgated under the Prohibition Act, Regulations 61, January 31, 1920, provided that permits to operate denaturing plants and permits to use specially denatured alcohol in manufacture should "remain in force until voluntarily surrendered or cancelled".—Articles 97 and 115. These provisions were continued in Articles 93 and 111 of Regulations 61, revised July 1925. These Regulations were superseded by Regulations 3, discussed in the text.

[4]The permit in No. 511 reads: "for violation of the provisions of Title III of the national" etc.

[5]The District Court's opinion in No. 510 is not yet reported. The case was heard by the court together with No. 511 and was disposed of on the same grounds as No. 511.

Among the "articles" enumerated in § 4, Title II, of the National Prohibition Act, (Oct. 28, 1919, c. 85, 41 Stat. 305, 309), which may be manufactured with the use of liquor, under permits, and which are excepted from operation of the Act "after having been manufactured and prepared for the market", are: "(a) Denatured alcohol . . . produced and used as provided by laws and regulations now or hereafter in force . . . . (d) Toilet . . . preparations and solutions that are unfit for use for beverage purposes." Title III, headed "Industrial Alcohol" provides, in § 10: "Upon the filing of application and bond and issuance of permit, denaturing plants may be established . . . and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage. Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export." There is no provision in the Act specifically requiring permits for the manufacture of toilet preparations with denatured alcohol.

First. The contentions of the Government in Nos. 445 and 510 are those already considered in *Campbell* v. *Galeno Chemical Co., supra.* The questions certified in No. 510 are:

"1. Is denatured alcohol, during its manufacture and preparation for the market, 'liquor' within the meaning of sections 1 and 6, Title II, of the national prohibition act, the latter of which provides that permits to manufacture 'liquor' may be issued for only one year?

"2. Does the provision of section 6, Title II, of the national prohibition act, which directs that every permit 'shall designate and limit the . . . time when' the authorized acts may be performed, apply to a permit to operate a denaturing plant, i, e., to use alcohol in the manufacture of denatured alcohol?

"3. Does a provision in a permit that it shall be in force until 'surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto.' comply with the above-mentioned requirement of section 6 of Title II of the national prohibition act, that every permit 'shall designate and limit the . . . time when' the authorized acts may be performed?

"4. May a permit to operate a denaturing plant, which permit provides that it shall be in force 'until surrendered by the holder

or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto,' be terminated by a general regulation providing that all such permits shall expire on a date named?"

We interpret the first question as inquiring whether a permit to manufacture denatured alcohol is a permit to manufacture liquor within the cited provision of § 6.[6] As thus construed, we answer it in the negative. For, whether issued under § 4, Title II or under § 10, Title III, the permits held by plaintiffs authorize them to convert something which is undoubtedly liquor into a product which is required to be unfit for use as a beverage; that is, to convert liquor into something which is not liquor.[7] *Campbell* v. *Galeno Chemical Co., supra.* For the reasons stated in that case, our answer to the third question is in the affirmative; and to the fourth question in the negative. In view of the answer to the third question, the second question need not be answered.

Second. In No. 511, the Circuit Court of Appeals certified the following questions:

"1. Does the provision of section 6, Title II, of the national prohibition act, which directs that every permit 'shall designate and limit the . . . time when' the authorized acts may be performed, apply to a permit to use specially denatured alcohol?

"2. (Same as question 3 in No. 510).[8]

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[6]If read literally, the first question is irrelevant to a decision and need not be answered. For, calling the solution "liquor" during its manufacture and preparation for the market—that is, before it is fully denatured and becomes the "article", denatured alcohol—does not aid in determining whether or not a permit to operate a denaturing plant and manufacture denatured alcohol is a permit "to manufacture . . . liquor." The character of the permit is determined, not by the nature of the solution in the process of manufacture, but by the character of the finished article authorized to be produced.

[7]We are not told what denaturants plaintiffs use; but we are asked to take judicial notice that denatured alcohol may be fitted for beverage purposes by extracting the denaturant. We may also take judicial notice that some denaturants cannot be successfully extracted; and that any denaturant must be "such that it can not be removed from the mixture and the treated product made fit for beverage purposes without great difficulty." See "Industrial Alcohol," a monograph issued by the Treasury Dept., Bureau of Prohibition, p. 4 (Gov't Ptg. Office, 1930). Moreover, from the standpoint of caution, denatured alcohol, however treated, is not fit for beverage purposes.

[8]Except for the slight variation in the language of the permit mentioned in note 1, *supra*, and quoted in the third question.

"3. May a permit to use specially denatured alcohol in the manufacture of toilet preparations, which permit provides that it shall 'be in effect until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or the regulations made pursuant thereto,' be terminated by a general regulation providing that all such permits shall expire on a date named?"

In this Court, the Government concedes that the permit here involved is not one to manufacture liquor within the meaning of either the special or the general time provisions of §6. It contends, however, that since toilet preparations and denatured alcohol used in their manufacture are both excluded by § 4 from the operation of the Act, the plaintiff's business is not one for which a permit is required by the statute; that if the plaintiff used so-called completely denatured alcohol, no permit would be required at all (Regulations 61 (1920), Art. 108; Regulations 3, (1927), Art. 106); that permits for the use of specially denatured alcohol are required only by the regulations of the Bureau pursuant to its general authority, conferred, among other sections, by § 13, Title III, to make regulations to guard against the diversion of alcohol for unlawful purposes and to protect the public revenue; that the power to issue regulations includes the power to repeal and amend them; that § 9, Title II, applies only to the permits required by statute and does not abridge the regulatory power with respect to permits required only by administrative regulation. The conclusion is, in our opinion, unsound.

Since no question has been raised as to the propriety of plaintiff's permit, we do not inquire whether the permit is required by the Act or whether its requirement by regulations is authorized thereby. But, if the requirement of the permit is proper, it is so only because it is authorized by the Act, either explicitly or otherwise. There is no suggestion that the regulations were made under any other authority. If, then, the permit was issued under authority of the Prohibition Act, the plaintiff comes within the description in § 9 of "any person who has a permit"; and that section provides the exclusive procedure for the revocation of the permit. The attempt to revoke it by regulations without complying with that

section exceeds the authority, and violates rights, conferred by the Act.[9]

We answer the third question in the negative. For reasons stated in connection with questions 2 and 3 in No. 510, we answer the second question in the affirmative; and do not answer the first.

No. 445—Affirmed.
No. 510—Question 1 answered No.
Question 2 not answered.
Question 3 answered Yes.
Question 4 answered No.
No. 511—Question 1 not answered.
Question 2 answered Yes.
Question 3 answered No.

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[9]The Government urges that under Act of October 3, 1913, c. 16, Section IV, N, subsec. 2, 38 Stat. 114, 199 and Act of June 7, 1906, c. 3047, 34 Stat. 217 (U. S. C., Tit. 26, §§ 481-487), the requirement of permits for the manufacture and denaturation of alcohol tax free, in special cases, was governed entirely by regulations; that permits under the regulations made pursuant to those Acts were limited to specific amounts of alcohol (Regulations 30, Art. 60, 61, 77-90); that §§ 10 and 11, Title III of the Act treat of similar subjects; and that the Prohibition Act, as shown by the report of the House Judiciary Committee (H. R. Report No. 91, 66th Cong., 1st sess., p. 2) purports to continue the policy of the prior Acts and regulations. There is a decisive difference between the Prohibition Act and those statutes. The former are silent on the whole subject of permits; the latter specifically provides how permits should be revoked. Moreover, the planitiffs in Nos. 443 and 444, relying on the same and even more specific portions of the House Committee report referring to the Lever Act, August 10, 1918, c. 53, §§ 15 and 16, 40 Stat. 276, 282, the Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, 1105-16, and Internal Revenue T. D. 2788, make quite as cogent an argument for a contrary conclusion. We need not consider the merits of either argument. For, we are of opinion that § 9 is applicable to the permits involved in all these cases. There is no need to seek light from debatable inferences from a general statement in the Committee report.

The Government also points out that, aside from the decisions in Nos. 443, 444, 445 and 510, its contentions in No. 511 are of great importance to the administrative officers in promulgating regulations governing the use of specially denatured alcohol. Our decision merely denies the power to revoke unexpired permits in a way other than that prescribed in the Act. As in Nos. 443 and 445, we refrain from deciding whether or not the Regulations are effective as to future applicants for permits.